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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

ELIZABETH H. BONNER,
Petitioner,

v.

JAMES B. PEAKE, M.D.,
SECRETARY OF VETERANS AFFAIRS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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February 22, 2008

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QUESTIONS PRESENTED FOR REVIEW

Under what circumstances does the United States Court of Appeals for the Federal Circuit have jurisdiction to review decisions of the Court of Appeals for Veterans Claims where the error appealed is failure to apply the correct law?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are a serviceman's widow, Elizabeth H. Bonner (Mrs. Emmett P.), and the Secretary of Veterans Affairs.

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The opinion of the United States Court of Appeals for the Federal Circuit (App. 1a–17a) is published at 497 F.3d 1323. That court's order denying rehearing and rehearing en banc (App. 38a–39a) is unpublished, but unofficially reported at 2007 U.S. App. LEXIS 28531 (Nov. 29, 2007). The opinion of the United States Court of Appeals for Veterans Claims (App.18a – 37a) is published at 19 Vet. App. 188.

JURISDICTION

The order of the court of appeals denying rehearing and rehearing en banc was entered on November 29, 2007. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 38, United States Code, Section 7292 provides in pertinent part:

Section 7292. Review by United States Court of Appeals for the Federal Circuit

> (a) After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation...or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. ...

* * *

(d) (2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

STATEMENT OF THE CASE

I. BACKGROUND FACTS AND ISSUES

This case, which arises under 38 U.S.C. §1310, stems from an application by Petitioner Elizabeth Bonner (the Widow) to the Department of Veterans Affairs for dependency and indemnity compensation based on the service-connected death of her husband, RADM Emmett P. Bonner, USN, from cancer (non-Hodgkin's lymphoma). (App. 51a, foldout Exhibit). Her application was denied on the basis that she claimed cause of death as "cancer" on the Veteran's Administration form rather than specifying the sub-type of cancer involved.

RADM Bonner graduated from the Naval Academy in 1939, and fought during WWII in the Atlantic aboard the cruiser USS Memphis, and in the Pacific aboard the cruisers USS Miami, and USS St. Louis. He married his wife, Petitioner, during the war.

During the Korean war he commanded USS Cogswell, DD651 and engaged in landings in Korea. He served two tours of duty in Vietnam during the Vietnam war: one as commander of the Seventh Fleet

flagship, the cruiser USS Oklahoma City, CLG-5 (including navigating it up the Saigon river to Saigon), and thereafter as Commander, U.S. Naval Support Activity, Danang.

He also served as Commander, Cruiser Destroyer Flotilla 6, and Commander, Mine Force, Atlantic Fleet. He retired in 1972, and died of non-Hodgkin's lymphoma in 1975 at age 57. The government immediately ceased paying his retirement benefits, and commenced paying the widow a small fraction of it as a widow's annuity.

A grateful nation provides dependency and indemnity compensation to widows of servicemen who die of a service-connected illness. (38 U.S.C. 1311). Non-hodgkin's lymphoma, and Hodgkin's lymphoma, are the two types of cancer of the lymph system; each is lethal if not properly treated and arrested.

The National Naval Medical Center (NNMC) in Bethesda treated RADM Bonner during his last illness, but misdiagnosed his illness as Hodgkin's disease, in a facially-dubious autopsy protocol. A month after his death, the widow filed an application for DIC based on cause of death of "Cancer". (App. 51a, foldout Exhibit). Two months later, the VA required her to send them the government's death certificate, and themselves obtained his records from the NNMC. Shortly thereafter the VA denied the claim for "Cancer" entirely, stating only "death not due to service."

In 1990 the VA amended its regulations to provide that non-Hodgkin's lymphoma was service-connected,

and made the regulation applicable to claims filed subsequent to 1964, even if previously denied. (38 CFR 3.313) The widow requested the National Institutes of Health (NIH) to review the slides and documents from RADM Bonner's treatment at NNMC, and NIH determined that the NNMC had erred in its diagnosis of Hodgkin's lymphoma, and found that he had actually died of non-Hodgkin's lymphoma. The Department of Justice agreed that the NIH had diagnosed non-Hodgkin's lymphoma.

II. DECISION OF THE BOARD OF VETERANS APPEALS

The widow applied to the VA for DIC under this new retroactive regulation. The Board of Veterans Appeals (BVA) denied the application, finding that the VA had considered her claim of "cancer" to constitute only a claim for Hodgkin's lymphoma (a limiting construction never made known by the VA to the widow). The BVA ruled that the claim of "Cancer" was only a claim for Hodgkin's lymphoma because the widow had written "Cancer" and not "non-Hodgkin's lymphoma" on the VA claim form in the box labeled "cause of death". The BVA did not discuss or apply decisions of this Court requiring words to be read to have their ordinary and customary meaning, nor did it discuss or apply statutory rules of decision in favor of veterans.

III. DECISION OF THE COURT OF APPEALS FOR VETERANS CLAIMS (VETERANS COURT)

The Veterans Court denied relief, finding that the BVA was not clearly erroneous in finding the claim for "Cancer" constituted a claim only for Hodgkin's lymphoma, because the widow had, two months after she filed her claim, sent the government's death certificate to the VA as the VA, after the claim was filed, had directed, and that the NNMC records, obtained from the NNMC by the VA thereafter, had diagnosed Hodgkin's lymphoma. (App.31a). The Veterans Court did not discuss or apply decisions of this Court concerning the interpretation of words to have their ordinary, contemporary, customary meaning, nor did it discuss or apply statutory and regulatory rules of decision favorable to veterans. It ruled that the evidence surrounding the claim (the government's death certificate, and the documents obtained by the government from the NNMC) established that the claim was for Hodgkin's disease, notwithstanding that it was the Widow's claim, not the government's, and that the government did not consult her in unilaterally giving her claim a restricted meaning. The Veterans Court denied the Widow's petition for rehearing, and for rehearing en banc.

The concurring opinion disagreed with the panel's opinion that the claim for "Cancer" was limited to Hodgkin's lymphoma. (App. 35a-37a).

IV. DECISION OF THE FEDERAL CIRCUIT

The widow presented as the lead argument in her opening brief to the Federal Circuit that " cancer means cancer. It includes non-Hodgkin's lymphoma." (App. 49a-50a). She cited to numerous decisions from this court: *Perrin v. United States*, 444 U.S. 37, 42 (1979)("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."); *Humana v. Forsyth*, 525 U.S. 299, 309-310 (1999)(using Black's law dictionary when interpreting a statutory term); *Leocal v. Ashcroft*, 543 U.S. 1, 15 (2004)(when interpreting a statute, we must give words their "ordinary or natural meaning"); and *Brown v. Gardner*, 513 U.S. 115, 118 (1994)(ambiguity in a statute is to be resolved in favor of the veteran.) (App. 49a-50a; 46a-48a; 42a-43a). No special, arcane, or peculiar knowledge of veterans law is required to interpret a single, common word "cancer". There is probably not a person in America who does not understand what it means. If the Federal Circuit had required adherence to this Court's precedents, *supra,* the widow would have succeeded in her appeal. Cancer means cancer; it includes non-Hodgkin's lymphoma.

The Federal Circuit declined to apply the above precedents or to review the Veterans Court's failure to do so; it ruled that this was "essentially a factual inquiry" (App. 10a) having stated that it "lack[ed] jurisdiction to review factual findings of the Veterans Court or that court's application of law to fact." (App.7a). In so doing, the Federal Circuit relied on its longstanding and frequently-employed interpretation

of 38 U.S.C. 7292(d)(2), citing to one of the numerous decisions expressing it, *Moody v. Principi*, 360 F.3d 1306, 1310 (Fed. Cir. 2004) as providing that "absent a constitutional issue, we are without jurisdiction to review a factual determination or an application of law to the particular facts in an appeal from the Court of Appeals for Veterans Claims." (App. 7a)

It is Petitioner's position that the words of 38 U.S.C. 7292(d)(2)(B) "a challenge to a law or regulation as applied to the facts of a particular case" do not prohibit review of the application of law to the facts to begin with, and further do not prohibit the Federal Circuit from determining whether the Veterans Court failed to apply applicable precedent of this Court in its fact-finding.

In dissent, Circuit Judge Newman (App. 12a-17a) pointed out with a command of the law and issues in this case largely absent from other treatments thereof, that the Department of Veterans Affairs was wrongly failing to correct its records to reflect that the RADM Bonner had indeed died of non-Hodgkin's lymphoma, there being no issue of fact in the matter, and that "It is not an unreviewable factual question of whether the VA is required to recognize an undisputed error in the veteran's records, and to apply the correct cause of death to survivor's claims." (App.17a). She further observed "The obligatory veteran-friendly position of the law governing veterans' claims negates this hyper-technical reason whereby the Veterans Court refused to consider the merits of Mrs. Bonner's claim." (App. 17a) [Cause of death, and the interpretation of the claim for "cancer", were the two issues presented to the Federal Circuit. The majority of the Federal Circuit

panel found that the Veterans Court did not decide the case on the basis of cause of death; remarkable since Judge Hagel of the Veterans Court had concurred *only* on the basis of agreeing with the panel's decision based on cause of death].(App. 35a-37a)

It is the widow's petition that this Court construe 38 U.S.C. 7292(d)(2)(B) as it is written, and hold that it does not bar the Federal Circuit from reversing the Veterans Court if the Federal Circuit finds that the Veterans Court failed to apply applicable precedent of this Court in its interpretation of the claim of "Cancer"

REASONS FOR GRANTING THE PETITION

The widow respectfully submits that there are compelling reasons why this Court should grant her petition for a writ of certiorari and review the Federal Circuit's decision:

1. The Federal Circuit's decisions persist in conflicting among themselves on the extent to which that Court has jurisdiction to review whether the Veterans Court erred in the law it used to find facts, especially in light of legislation in 2002 expanding the Federal Circuit's review to include "rule of law" jurisdiction. The Federal Circuit's jurisdictional decisions, exemplified by the instant case, reflect a line of decisions over the past 17 years misconstruing the Court's jurisdiction in a manner harmful to veterans, and which should be settled by this Court.

2. The Federal Circuit has exclusive jurisdiction to review decisions of the Veterans Court. As such, the Federal Circuit does not have the benefit, available to the other Circuits on other issues, of informing their rulings based on the reason and experience of other Circuits. The sole judicial guidance available to the Federal Circuit is from this Court.

3. This case presents an excellent vehicle for this Court to resolve an important issue of the Federal Circuit's jurisdiction. The Federal Circuit has resolved literally hundreds of cases against veterans on the basis appealed herein, and has recently accelerated its rate of so doing.

4. This Court has granted certiorari only twice in history to review a decision of the Federal Circuit reviewing a decision of the Veterans Court : once in a case where the Secretary was Petitioner, *Brown v. Gardner*, 513 U.S. 115 (1994) involving disability benefits, and once in a case involving attorneys fees, *Scarborough v. Principi*, 541 U.S. 401 (2004). This Court has never granted certiorari in a case wherein a veteran sought review on a matter involving a veterans claim. This case, dealing with the jurisdiction of the Federal Circuit and the applicability of this Court's precedents, is susceptible to the concise and direct (and unanimous) treatment this Court afforded in *Brown v. Gardner*, 513 U.S. 115 (1994), and would greatly assist a large and continuing class of veterans.

I. THE FEDERAL CIRCUIT HAS MISINTERPRETED 38 U.S.C. 7292(D)(2)(B) SINCE ITS ENACTMENT IN 1988, TO THE DETRIMENT OF VETERANS APPEALS

The Federal Circuit has been ruling against veterans in a substantial number of cases for 17 years, based on an alleged lack of jurisdiction in the Federal Circuit to review the application of law to the facts. That Court has done so by interpreting "challenge to a law or regulation as applied to the facts" to mean "challenge to the application of law to the facts." The two sound enticingly alike, in the way hydrocarbons and carbohydrates sound alike, but are as different as petroleum and a loaf of bread.

The Federal Circuit's jurisdiction does extend to reviewing the application of law to the facts of a case; at least insofar as it is called on to review whether the correct law has been applied, the Federal Circuit's longstanding opinion to the contrary notwithstanding.

The Veterans Judicial Review Act, effective September 1, 1989, granted jurisdiction to the Federal Circuit to review decisions of the Veterans Court. It barred the Federal Circuit from reviewing "a challenge to a factual determination,...or a challenge to a law or regulation as applied to the facts of a particular case." 38 U.S.C. 4092(d)(2), *redesignated as* 7292(d)(2).

The concept of challenging a law "as applied" is familiar in this Court's jurisprudence. For example, statutes can be either facially unconstitutional, or unconstitutional as applied. *See, e.g., Wis. Right to Life, Inc. v. FEC,* 546 U.S. 410 (2006)(Court's ruling

that a statutory definition was facially valid did not preclude the organization's as-applied challenge to the definition).

During the time in 1988 when Congress was considering granting jurisdiction to the Federal Circuit to review decisions of the Veterans Court, various interested parties sought to have Congress enact legislation that would prohibit the Federal Circuit from reviewing the application of law to the facts. What Congress actually did, though, was something different. It prohibited challenges to laws or regulations as applied; not challenges to the application itself.

The two are quite distinct; the former is a challenge to the law; the latter is a challenge to the application (or lack of application).

This did not deter the Federal Circuit from beginning an unbroken series of decisions interpreting what Congress actually gave them to mean what had been sought but which Congress did not provide.

In *Forshey v. Principi*, 284 F.3d 1335 (Fed. Cir. 2002)(En Banc), the Federal Circuit conducted an exhaustive review of its entire jurisdiction under Section 7292, including an extended discussion of the legislative history of the statute. The Court noted that debate in 1988 in Congress "was contentious", and that proposed language in the statute (Section 4042(b) of House Bill 5288) included that the Federal Circuit, except as to constitutional issues "may not review the facts of the appeal or the application of any law or regulation to those facts unless there is presented a

constitutional issue." *Forshey, supra*, 284 F.2d at 1346. This language did not make it into the final bill as enacted; the language that did become law is that of 38 U.S.C. 7272(d)(2), except as to constitutional issues, the Federal Circuit may not review "(A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." Thus, although what has become the Federal Circuit's interpretation of Section 7292(d)(2) was discussed in Congress, it was explicitly rejected and replaced by language having a different effect.

To be clear: Congress jettisoned the language forbidding review of "application of law to the facts". Shortly thereafter, the rejected language resurfaced in the opinions of the Federal Circuit as the Court's interpretation.

The first Federal Circuit case construing section 7292 was *Machado v. Derwinski*, 928 F.2d 389, 391 (Fed. Cir. 1991), which merely (and correctly) held the Act authorized that court to review non-factual decisions of the Veterans Court.

The entrance on stage of the erroneous and persistent misconstruction of the statute appeared in an unpublished *opinion* (soon making its way into precedential opinions); *Boles v. Derwinski*, No. 91-7072, decided October 10, 1991 , 1991 U.S. App. LEXIS 33149, where the Federal Circuit ruled:

> "In answer to question three of the informal brief, 'did the trial court apply the wrong law,' Boles responds, 'perhaps the COVA [Court of Veterans Appeals] did apply the wrong law....

> Petitioner is of the opinion that [various regulations] should be applied.' Boles' challenge thus clearly concerns only the *application* of the regulations to the facts of his case.
>
> In the recent decision of *Machado v. Derwinski*, 928 F. 2d 389, 391 (Fed. Cir. 1991), we held that the Veterans Judicial Review Act 'authorize[s] this court to review non-factual decisions of the Veterans court' (emphasis added). As Boles challenges only factual decisions made by the Veterans Court, Boles' appeal falls beyond the limited jurisdiction of this court." (emphasis in original)

"Challenge to a law or regulation as applied to the facts" becomes "application of law to the facts". We are told often by the Federal Circuit that it lacks jurisdiction to review the application of law to the facts, but that Court, significantly, has, after 17 years, never explained how the former means the latter.

By the time the 2002 revision of the Federal Circuit's jurisdiction (which granted it "rule of law" jurisdiction"), was wending its way into the Federal Circuit's decisions, the Federal Circuit showed it had firmly settled on its interpretation of its jurisdictional statute, albeit with no more discussion of its lack of statutory basis than that provided in *Boles*, supra. For example, in *Cook v. Principi*, 353 F. 3d 937 (Fed. Cir. 2003), the Court held:

> "As we have often explained, section 7292(d)(2) precludes this court's review of factual determinations and applications of the

law to facts where no constitutional issues are involved. See *Halpern v. Principi*, 313 F. 3d 1364, 1369 (Fed. Cir. 2002); *Jefferson v. Principi*, 271 F.3d 1072, 1075-79 (Fed. Cir. 2001); *Woodson v. Brown*, 87 F. 3d 1304, 1307 (Fed. Cir. 1996); *Albun v. Brown*, 9 F. 3d 1528, 1530 (Fed. Cir. 1993)....the review requested here would unavoidably require a review of the Veterans court's application of law to the facts."

II. LEGISLATION IN 2002, GRANTING RULE OF LAW JURISDICTION TO THE FEDERAL CIRCUIT, MAKES THAT COURT'S CONTINUING MISINTERPRETATION OF ITS JURISDICTIONAL STATUTE MORE MANIFESTLY ILL-FOUNDED.

Congress changed the law in 2002 in the wake of an invitation made in *Forshey, supra*, 284 F.3d at 1353, that Congress revisit the Court's jurisdictional statute to confer "case" jurisdiction. Congress in effect granted this by enacting "rule of law" jurisdiction.

On December 6, 2002, section 402 of the Veterans Benefits Act (VBA) of 2002 became law. Section 402 of the VBA amended 38 U.S.C. 7292, which sets out the scope of the Federal Circuit's jurisdiction to review decisions of the Veterans Court. The statute as amended provides in pertinent part:

> (A) After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of a ***decision of the Court on a***

> ***rule of law or of*** any statute or regulation ...or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the court in making the decision.
>
> ...
>
> (2)(d) except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

38 U.S.C. 7292 (2004) (emphasis added). The emphasized phrase was added to the statute by section 402 of the VBA; its purpose was stated by Senator Rockefeller to be as follows:

"Section 402 of the Compromise Agreement would also expand the Federal Circuit's authority to review CAVC decisions based on rules of law that are not derived from a specific statute or regulation. This change would allow the Federal Circuit to review comprehensively any CAVC decisions of law that adversely affect appellate reviews of veterans' claims." 148 Cong Rec S 11329, Monday, November 18, 2002.

The Federal Circuit, in *Wilson v. Principi*, 391 F.3d 1203, 1208 (Fed. Cir. 2004) quoted the above legislative change, and held that:

> "it means at least this much: in a case ...in which the decision below regarding a governing rule of law would have been altered by adopting the position being urged, this court has

> jurisdiction to entertain the matter, even though the issue underlying the stated position was not 'relied on' by the[Court of Appeals for Veterans Claims]." *Citing*: *Morgan v. Principi*, 327 F.3d 1357, 1363 (Fed. Cir. 2003).

The "rule of law" involved in *Morgan* was the judicially-created doctrine of equitable tolling; that involved in *Wilson* was the application of a statute involving attorneys fees. The Federal Circuit in *Wilson* concluded:

> "We now hold that a 'rule of law' within the meaning of of 38 U.S.C. 7292 as amended is not limited to those judicially created, but, as a simple matter of plain meaning, included legislatively created law as well." *Wilson v. Principi, supra*, 391 F.3d at 1211.

The decision of the Veterans Court in the instant case below which was arrived at without applying this Court's precedents on interpretation of words, would have been altered if that Court had in fact applied this Court's precedents. Therefore, the Federal Circuit in fact had jurisdiction to review the decision of the Veterans Court on this rule of law, and erred in following the numerous decisions of the Federal Circuit to the effect that it did not have jurisdiction, based on the routine, longstanding, erroneous interpretation the Federal Circuit has placed on 38 U.S.C. 7292(d)(2)(B).

III. THE FEDERAL CIRCUIT'S INTERPRETATION OF ITS JURISDICTIONAL STATUTE CONFLICTS WITH ITS RULE OF LAW JURISDICTION

Application of law to the facts involves judgments of law, including which law to apply. It if is complained that mixed questions of law and fact were disfavored in 1988, the 2002 "rule of law" jurisdiction has settled that issue. If the Federal Circuit finds that the wrong law has been used, or the correct law dispensed with, it does not itself have to apply the law to the facts; what it must do is remand the matter to the Veterans Court for that Court to apply the correct law. I.e., the selection of law applied by the Veterans Court is subject to review, and not jurisdictionally barred.

Notwithstanding this opinion, the Federal Circuit continues to decide cases based on the erroneous proposition of law that it is precluded from judging "the application of law to the facts'. (See Argument IV, below) This is doubly pernicious in that the precedents of this Court regarding the interpretation of words are binding on the Federal Circuit, and on the Veterans Court, whether or not those courts consider them "rules of law" of equal stature to statutes, regulations, or particular judicially-created doctrines such as equitable estoppel or the so-called "treating physician" rule, as specified in *Morgan, supra*, 327 F. 3d at 1362. This Court is respectfully urged to make this explicit.

It is a poor practice, and one contrary to statute and judicial precedent, for the VA to lead claimants on

with assertions of benevolence and liberal treatment, and then apply a harshness worthy of the sharpest practice. Thus far, the widow's claim of "cancer" has been mutilated to the extent that it is not even construed literally by the VA, and has been so abused in the teeth of precedent of this Court. The ruling below is that if the widow had written non-Hodgkin's lymphoma on the form, the VA would have granted her the insurance her husband had earned and paid for with his life, but that since she wrote cancer, they will not. This because the government decided that the claim must have been based solely on the lymphoma it had misdiagnosed, but as to which they did not trouble themselves to inquire of the widow. The facts ultimately found may not be reviewable by the Federal Circuit, but the law used to get there is, which is the ruling the widow seeks from this Court.

The jurisdiction of the Federal Circuit (and the relief available to veterans) is not dependent on whether the Veterans Court declines to articulate the rules of law it chooses to apply. Federal Circuit jurisdiction cannot be defeated by the manner in which the lower court writes its opinion. Where the record shows, as here, that applicable law was not applied, the Federal Circuit has jurisdiction to review it.

Even if the statute were ambiguous (which it is not), precedent of this Court would still require the reading that the widow urges here. In *King v. St. Vincent's Hospital,* 502 U.S. 215, 220-21 n.9 (1991), this Court made it clear:

> "Even if the express examples unsettled the significance of subsection (d)'s drafting,

> however, we would ultimately read the provision in King's favor under the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285, 90 L. Ed. 1230, 66 S.Ct. 1105 (1946). We will presume congressional understanding of such interpretive principles, e.g., McNary v. Haitian Refugee Center, Inc., 498 U.S. 275, 285, 90 L. Ed. 2d 1005, 111 S. Ct. 888 (1991)("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction")."

This Court quoted the above in *Brown v. Gardner*, 513 U.S. 115, 118 (1994), and the widow quoted it to the Federal Circuit in her opening brief to that Court below, with no perceptible result.

IV. THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW

The Federal Circuit decides approximately 350 appeals per year from the Veterans Court, and denies many of them on the basis that it lacks jurisdiction to review the application of law to the facts. (*See*: www.cafc.uscourts.com "statistics" and "opinions and orders").

The current state of Federal Circuit law on this area is that the Federal Circuit has jurisdiction to review Veterans Court decisions on a rule of law where the Veterans Court has specified that the law it is

applying is a statute or regulation, but does not have jurisdiction to review the misapplication of a rule of law (which is in actuality the application of an erroneous rule of law) or even to review the entire failure to apply applicable law. The Federal Circuit routinely declines to review whether the Veterans Court applied the correct law in finding or affirming facts; this is a huge problem for veterans whose experience with VA factfinding has been less than satisfactory.

Most of these decisions are not published, but are nevertheless reported. Those not published remain good examples of the need for this Court's supervisory intervention.

A flood of examples of the Federal Circuit's use of their interpretation "application of law to the facts" can be found by running the phrase against the Federal Circuit and the Veterans Court on a legal search engine. Some examples in addition to the instant case include:

Cook v. Principi, 353 F. 3d 937 (Fed. Cir. 2003)

Vaughn v. Principi, 336 F.3d 1351 (Fed. Cir. 2003); cert. denied, 541 U.S. 987 (2004)

Prillaman v. Principi, 346 F.3d 1362 (Fed. Cir. 2003)

Winsett v. Principi, 341 F. 3d 1329 (Fed. Cir. 2003)

Dela Cruz v. Principi, 55 Fed. Appx. 541, 2003 U.S. App. LEXIS 469 (Fed. Cir. 2003)(unpub)

Williams v. Principi, 114 Fed. Appx. 386, 2004 U.S. App. LEXIS 23058 (Fed. Cir. 2004)(unpub)

Dolor v. Principi, 123 Fed. Appx 988 (Fed. Cir. 2005)(unpub)

Durr v. Nicholson, 400 F. 3d 1375 (Fed. Cir. 2005)

Stoll v. Nicholson, 401 F. 3d 1375 (Fed. Cir. 2005)

AF v. Nicholson, 2006 U.S. App. LEXIS 3149 (Fed. Cir. 2006)(unpub).

Waddell v. Nicholson, 2006 U.S. App. LEXIS 26873 (Fed. Cir. 2006)(unpub)

Mandonahan v. Nicholson, 2006 U.S. App. LEXIS 32336 (Fed. Cir. 2006)(unpub)

Browder v. Nicholson, 185 Fed. Appx. 950, 2006 U.S. App. LEXIS 14319 (Fed. Cir. 2006)(unpub)

Bradley v. Nicholson, 181 F. Appx. 989, 2006 U.S. App. LEXIS 11960 (Fed. Cir. 2006)(unpub)

Lopez v. Nicholson, 172 Fed. Appx. 1004, 2006 U.S. App. LEXIS 5945 (Fed. Cir. 2006)(unpub)

Perillo v. Nicholson, 176 Fed. Appx. 107, 2006 U.S. App. LEXIS 8516 (Fed. Cir. 2006)(unpub)

Balboa v. Nicholson, 2007 U.S. App. LEXIS 3054 (Fed. Cir. 2007)(unpub)

Thomas v. Nicholson, 2007 U.S. App. LEXIS 8094 (Fed. Cir. 2007)(unpub)

Ivy v. Mansfield, 2007 U.S. App. LEXIS 26744 (Fed. Cir. 2007)(unpub)

Miller v. Nicholson, 2007 U.S. App. LEXIS 11644 (Fed. Cir. 2007)(unpub)

Williams v. Nicholson, 2007 U.S. App. LEXIS 13470 (Fed. Cir. 2007)(unpub)

Carter v. Nicholson, 2007 U.S. App. LEXIS 16062 (Fed. Cir. 2007)(unpub)

Govan v. Nicholson, 2007 U.S. App. LEXIS 19054 (Fed. Cir. 2007)(unpub)

Rivers v. Mansfield, 2007 U.S. App. LEXIS 28339 (Fed. Cir. 2007)(unpub)

Wright v. Mansfield, 2007 U.S. App. LEXIS 23287 (Fed. Cir. 2007)(unpub)

Gravely v. Peake, (nonprecedential), Federal Circuit, No. 2007-7205, Decided February 8, 2008 ("arguments...directed to factual determinations and the application of law to facts [are] issues outside the scope of our jurisdiction.")

Roszkowiak v. Peake, (nonprecedential), Federal Circuit No. 2007-7227, Decided January 14, 2008 ("because [this] appeal challenges the application of the regulation by the RO, Board, and Veterans Court to the facts of his case, the appeal is beyond the scope of this court's review.")

Gray v. Peake, (nonprecedential) Federal Circuit No. 2007-7223, Decided January 11, 2008 ("...the government argues that we are without jurisdiction to hear Gray's claim because it involves application of the law to facts. We agree with the government that we lack jurisdiction...")

Where the the Court fails to apply applicable law, it is in fact applying a rule of law that has in it that the ignored applicable law does not apply. Both courts below reviewing the claim of "Cancer" applied rules of law that did not include within them the rule of law that this Court's precedents on interpretation of words must be obeyed and applied. A sin of omission, rather than commission, yet equally cognizable and equally erroneous.

Where the proper law is used to find a fact, Petitioner has no quarrel with the Federal Circuit finding it lacks jurisdiction to review the discretion used (although petitioner would argue that the Federal Circuit can reverse and remand if it finds that the applicable law was improperly used by the Veterans Court). But where the applicable law is not used *at all*, and the reviewing court will not even examine whether the correct law was left aside, even when

repeatedly brought directly to its attention, as in the instant case, then Petitioner respectfully prays that this Court will intervene.

Here, one fact to be determined was "what does the claim form say". It says "Cancer". Right on the front of the form, easy to read, no question about it. (App. 51a) The next fact, "what does Cancer mean?" requires the application of this Court's precedents concerning words being given their ordinary, contemporary, customary meaning. This determination of fact (what does it mean?) is beyond review *after* the appropriate law is applied to it. *Whether* the appropriate law has been applied is a question of law. The Federal Circuit declines to allow that this is so.

The Federal Circuit's reading of its jurisdictional statute is firmly entrenched in its jurisprudence. The fact that the Federal Circuit has so often deployed its opinion that it lacks jurisdiction to review application of law to the facts and has done so without ever addressing the clear conflict between what the statute actually says and what the Court reads it to say, is a solid indicator that the Court will not address this problem itself. Legislative rejection of the Federal Circuit's language in the drafting stage of the legislation to begin with, and the subsequent addition of rule of law jurisdiction have proved ineffective to corral this practice.

The issue is so commonplace in Federal Circuit cases as to be almost imperceptible and to pass almost without comment. The claim of 'Cancer" herein should have easily been resolved in the widow's favor as

encompassing a claim for all forms of it unless otherwise modified with her knowledge and consent. This reading is consistent with decisions of this court, and other law affording the veteran the benefit of the doubt (38 U.S.C. 5107(b)), calling for resolution of ambiguities in his favor, and requiring that words be given their common, contemporary, ordinary meaning.

That this did not occur has been outcome-determinative below, and yet caused the merest ripple on the surface of the Federal Circuit's opinion. The precedent of this Court cited to the Federal Circuit, and the argument supporting it would be entirely unknown to this Court had the widow not included it in this Petition. We presented it to the Federal Circuit in our opening brief (App. 49a) our reply brief (App. 46a) and in our petition for rehearing (App. 40a).

This issue is almost designed to evade review, and is guaranteed of repetition. The significance of the legal error raised here is not apparent from the face of the Court's opinion (although the error itself is) and had to be resurrected from the briefs in a kind of forensic archaeology. And this was a published opinion! Many such opinions reciting the same error of law are not. A decision by this Court making it clear that the Federal Circuit's jurisdiction *does* extend to reviewing the application of law to the facts in deciding whether the correct law was used or not used, said law including this Court's precedents concerning the interpretation of words would be an immediate and tangible benefit to the many veterans for whom Congress sought to provide comprehensive judicial review. The Government consistently argues that the Federal Circuit lacks jurisdiction to review the

application of law to the facts (as it did in the instant case, for example) and the Federal Circuit has shown no inclination to divest itself of what has been a highway to case resolution.

CONCLUSION

For all of the reasons set forth above, Petitioner Elizabeth H. Bonner respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2005-7190

[Decided August 16, 2007]

ELIZABETH H. BONNER,
Claimant-Appellant,

v.

R. JAMES NICHOLSON,
Secretary of Veterans Affairs,
Respondent-Appellee.

Appealed from:
United States Court of Appeals for Veterans Claims

Before NEWMAN, *Circuit Judge*, ARCHER, *Senior Circuit Judge*, and GAJARSA, *Circuit Judge*.

Opinion for the court filed by *Senior Circuit Judge* ARCHER. Dissenting opinion filed by *Circuit Judge* NEWMAN.

ARCHER, *Senior Circuit Judge*.

Elizabeth Bonner ("Mrs. Bonner") appeals the United States Court of Appeals for Veterans Claims' ("Veterans Court") affirmance of the Board of Veterans' Appeals' ("Board") determination that she was not entitled to an effective date earlier than November 1, 1994, for dependency and indemnity compensation ("DIC"). *Bonner v. Nicholson*, No. 02-0742 (Vet. App. June 17, 2005). Because we conclude that the Veterans Court neither misinterpreted *Moody v. Principi*, 360 F.3d 1306 (Fed. Cir. 2004), nor committed harmful error, we affirm the Veterans Court's judgment.

I.

Rear Admiral Emmett P. Bonner ("Admiral Bonner") died on August 1, 1975, following a distinguished career in the United States Navy. Shortly thereafter, his wife, Elizabeth Bonner, filed a claim for DIC with the Veterans Administration Regional Office ("RO") listing "cancer" as the cause of Admiral Bonner's death. The supporting evidence filed with this claim included an autopsy report from the National Naval Medical Center ("NNMC") listing Hodgkin's disease as cause of death and a death certificate listing Hodgkin's disease as the "immediate cause" of death. The RO determined the cause of death as Hodgkin's disease, a form of cancer, which had been diagnosed during Admiral Bonner's hospitalization from January to April 1975. The RO denied the claim for DIC because there was no evidence of service connection. The decision was not appealed and, therefore, became final.

Thereafter, 38 C.F.R. § 3.313 was issued in 1990 to address service connection for injuries caused by exposure to herbicides during military service in Vietnam. It provided, in pertinent part, that "[s]ervice in Vietnam during the Vietnam Era together with the development of non-Hodgkin's lymphoma ["NHL"] manifested subsequent to such service is sufficient to establish service connection for that disease." 38 C.F.R. § 3.313(b) (1990). This regulation was made retroactive to August 5, 1964. 55 Fed. Reg. 43,123 (Oct. 26, 1990).

The following year the Agent Orange Act of 1991 was enacted. This Act directed the Secretary, in certain circumstances, to establish presumptions of service connection for other diseases found to be associated with herbicide exposure while serving in the military. 38 U.S.C § 1116. Any presumption afforded by this statute was to be effective only prospectively from the date the final regulations were issued. 38 U.S.C. § 1116(c)(2). In 1994, pursuant to the Agent Orange Act, the VA added Hodgkin's disease to the list of diseases presumptively associated with exposure to herbicides in Vietnam. 59 Fed. Reg. 5106 (Feb. 3, 1994) (in relevant part amending 38 C.F.R. § 3.309 and 38 C.F.R. § 3.307).

In 1995, pursuant to a claim by Mrs. Bonner under the Radiation Exposure Compensation Act, Pub. L. No. 98-542, 98 Stat. 2725, tissue samples from Admiral Bonner were examined by the National Institutes of Health ("NIH"). The findings of this examination reported that "immunohistochemical studies favor the

diagnosis of non-Hodgkin's lymphoma."[1] Based on this conclusion and, presumably, the above regulations promulgated in the 1990s, Mrs. Bonner submitted a letter to the VA stating that Admiral Bonner's death was likely related to NHL; that Admiral Bonner had been exposed to radiation during his military service; and that she was, therefore, entitled to DIC effective as of the date of her 1975 claim.

The RO treated this letter as a request to reopen Mrs. Bonner's previously denied claim on the basis of new and material evidence under 38 U.S.C. § 5108 (2000). The RO awarded Mrs. Bonner DIC effective November 1, 1995, the date of receipt by the VA of her letter, based on the non-appealed finding that Hodgkin's disease caused Admiral Bonner's death but applying the presumption of service connection for such disease under the Agent Orange Act. Mrs. Bonner filed a Notice of Disagreement contending that because she filed a claim for service connection for the cause of Admiral Bonner's death shortly after his death, the effective date for DIC should be the date on which he died, August 1, 1975. The RO subsequently issued a statement of the case which granted an

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[1] Contrary to the dissent's assertion, the 1995 NIH report reexamining Admiral Bonner's condition at the time of his death was ambiguous in that his illness "simulat[ed] Hodgkin's Disease" but also "favor[ed] a diagnosis of non-Hodgkin's lymphoma." This does not demonstrate that the 1975 diagnosis of Hodgkin's Disease as the cause of death was indisputably incorrect. After a detailed review of the 1995 NIH report, the RO concluded that the evidence was also consistent with Hodgkin's Disease. Regardless, as explained below, the cause of Admiral Bonner's death was not relevant to the decision of the Veterans Court.

earlier effective date for DIC benefits of November 1, 1994, one year prior to the November 1, 1995 application to reopen the claim. This award was based upon the regulation that provides that if a claim is reviewed more than one year after the effective date of a change in the law, as was the case here, benefits may be authorized for a period of one year prior to the date of receipt of such request. *See* 38 C.F.R. § 3.114(a)(3).

Following several more exchanges between Mrs. Bonner and the VA, in August 1999, the RO issued a supplemental statement of the case noting Mrs. Bonner's assertion that NHL was the cause of Admiral Bonner's death. This supplemental statement of the case clarified the bases for the RO's determination that the cause of Admiral Bonner's death was Hodgkin's disease. Specifically, the RO stated that the 1995 NIH biopsy and medical records did not provide a definitive diagnosis of NHL. The RO noted that the presence of Reed-Sternberg cells and variants found in the 1995 biopsy was consistent with a diagnosis of Hodgkin's disease. The RO also indicated that the final diagnosis in the 1995 report of "malignant lymphoma, large cell, immunoblastic type, with necrosis involving the lymph nodes [and] liver," was similarly consistent with Hodgkin's lymphoma.

Mrs. Bonner appealed this decision to the Board. The Board first noted that in order for Mrs. Bonner to receive benefits under 38 C.F.R. § 3.313(a), the denial of her 1975 claim had to have been a denial of a claim for service connection for NHL, not a denial of service connection for another disease. Based on this conclusion, the Board opined that it did not need to reach the issue of whether an effective date for an

award of DIC based on Mrs. Bonner's 1975 claim would have been warranted if the RO had awarded DIC in 1995 based on a cause of death from NHL, as opposed to Hodgkin's disease. This was "because the denial of [Mrs. Bonner's] original claim in 1976 was a denial based on [a claim for] cause of death from Hodgkin's disease, not NHL." In other words, Mrs. Bonner was ineligible for retroactive benefits under § 3.313 because her 1975 claim was for Hodgkin's disease and not NHL.[2] Having made this determination, the Board explained that for the reasons posited by the RO, the earliest effective date Mrs. Bonner could receive was November 1, 1994.

Mrs. Bonner appealed the Board's decision to the Veterans Court. Affirming the Board's action, the Veterans Court concluded that "the evidence established that Mrs. Bonner's [1975] claim was one for Hodgkin's disease as the cause of her husband's death, and, therefore, we cannot conclude that the evidence reasonably raised any claims for the cause of death by types of cancer other than Hodgkin's disease." *Bonner*, 19 Vet. App. at 19-20. The Veterans Court also noted that the Board did not disturb the RO's finding that the evidence of record revealed Hodgkin's disease as the cause of Admiral Bonner's death and therefore the cause-of-death finding remained

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[2] Under VAOPGCPREC 5-94 (a VA General Counsel Precedential Opinion) benefits under § 3.313 are awarded retroactive to "the date . . . of an original claim for *that* [NHL] benefit . . . if the claimant was otherwise eligible on the date of claim." (emphasis added). Thus, in order to receive benefits under § 3.313, the original claim must have been one for NHL.

Hodgkin's disease. The Veteran's Court then concluded that "the Board had a plausible basis to find that the cause of Mr. Bonner's death was Hodgkin's disease." *Id.* at 21.

Mrs. Bonner challenges the Veterans Court's determinations. We have jurisdiction pursuant to 38 U.S.C. § 7292.

II.

A.

We have limited jurisdiction to review a decision of the Veterans Court. We may review the validity of "a rule of law or of any statute or regulation . . . or any interpretation thereof . . . that was relied on by the [Veterans Court] in making the decision." 38 U.S.C. § 7292(a) (2000). Included within this review is whether the Veterans Court exceeded its jurisdiction, *Wanner v. Principi*, 370 F.3d 1124, 1128 (Fed. Cir. 2004) (explaining that the "Veterans Court's compliance with its jurisdictional statute is a question of law, reviewed de novo" by this court), and whether the Veterans Court "misinterpreted our rulings in earlier decisions on an issue of law," *Moody v. Principi*, 360 F.3d 1306, 1310 (Fed. Cir. 2004). We review de novo a claim that the Veterans Court committed legal error. *Id.* However, absent a constitutional issue, we lack jurisdiction to review factual findings of the Veterans Court or that court's application of law to fact. *Id.*

B.

Mrs. Bonner alleges two errors in the Veterans Court's decision. First, Mrs. Bonner asserts the Veterans Court misconstrued our decision in *Moody v. Principi* ("*Moody*") when it did not read her 1975 claim for "cancer" as encompassing a claim for NHL. This position is grounded in the assertion that the clinical findings contained in the 1975 autopsy report also supported a determination that Admiral Bonner's death was caused by NHL. Second, Mrs. Bonner contends the Veterans Court exceeded its jurisdiction when it decided a factual issue, the cause of Admiral Bonner's death, that the Board did not reach in the first instance. Mrs. Bonner concedes that in order for her "to prevail ultimately in receiving DIC as of the date of her original claim, she will have to establish that her husband died of non-Hodgkin's lymphoma, and that her original claim was broad enough to encompass non-Hodgkin's lymphoma."

The government argues that we lack jurisdiction to review the factual determination that Hodgkin's disease was the cause of Admiral Bonner's death. It further argues that the Veterans Court correctly concluded that the Board did not err in holding that Mrs. Bonner was not entitled to a 1975 effective date for DIC benefits. Additionally, the government contends that Mrs. Bonner failed to demonstrate how the VA erred in developing her 1975 claim and that even if Mrs. Bonner were able to show that she had reasonably raised a claim for NHL in 1975 that has not yet been adjudicated, such an error is to be

corrected through a motion asserting the VA had committed clear and unmistakable error ("CUE").[3]

C.

In *Moody*, we reiterated that "with respect to all pro se pleadings," *id.* at 1310, the VA must give a sympathetic reading to the veteran's filings by "'determin[ing] all potential claims raised by the evidence, applying all relevant laws and regulations,'" *id.* (quoting *Roberson v. Principi*, 251 F.3d 1368, 1373 (Fed. Cir. 2001)). We can find no indication that the Veterans Court misinterpreted this mandate. In fact, the Veterans Court expressly recited the legal standard quoted above. *Bonner*, 19 Vet. App. at 18. The Veterans Court examined the evidence of record and concluded:

> At the time of the 1976 RO adjudication, the evidence established that Mrs. Bonner's claim was one for Hodgkin's disease as the cause of her husband's death, and, therefore, we cannot conclude that the evidence reasonably raised any claims for the cause of death by types of cancer other than Hodgkin's disease. *Compare Moody, Szemraj, Roberson.*

Id. at 19-20.

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[3] The only way the RO's unappealed 1976 decision can be collaterally attacked is through a claim of "clear and unmistakable error" ("CUE"). At oral argument, Mrs. Bonner conceded that a CUE claim was not at issue in this case. Therefore, the issue of the validity of the 1976 decision is not before us.

Mrs. Bonner does not explain how the Veterans Court purportedly misinterpreted *Moody*. In *Moody* we rejected the Veterans Court's suggestion that in order for pleadings to be read as containing a potential claim there must have been "evidence undebatably establish[ing]" the existence of such a claim. *Moody*, 360 F.3d at 1310. Mrs. Bonner does not argue that the Veterans Court required her to make a more stringent showing than that required by *Moody*. Nor does she contend that the Veterans Court improperly determined that the mandate of *Moody* did not apply here. In essence, Mrs. Bonner takes issue with the Veterans Court's application of *Moody*. That is, she disagrees with the Veterans Court's conclusion that a claim for NHL was not supported by the evidence before the RO in 1976. However, the interpretation of the 1975 claim "is essentially a factual inquiry, and it is beyond our jurisdiction to make that determination." *Moody*, 360 F.3d at 1310.[4]

Mrs. Bonner also contends that the Veterans Court exceeded its jurisdiction when it decided a factual

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[4] We note that when the VA fails to construe the veteran's pleadings to raise a claim, such an error is properly corrected through a CUE motion. *See Bingham v. Nicholson*, 421 F.3d 1346, 1349 (Fed. Cir. 2005) (explaining that the VA's failure to consider all aspects of a claim is properly challenged through a CUE motion); *Andrews v. Nicholson*, 421 F.3d 1278, 1284 (Fed. Cir. 2005) (stating "when the VA violates *Roberson* by failing to construe the veteran's pleadings to raise a claim, such claim is not considered unadjudicated but the error is instead properly corrected through a CUE motion"). CUE is not simply a "buzz word" as stated by the dissent. It is a statutorily created avenue for challenging a VA decision. *See* 38 U.S.C. § 5109A.

issue—the cause of Admiral Bonner's death—that the Board did not reach. Under 38 U.S.C. § 7261(a), the Veterans Court's jurisdiction is limited to deciding issues that are "necessary to its decision and presented" to it. 38 U.S.C. § 7261(a)(4) (2000) (stating "[i]n any action brought under this chapter, the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall . . . in the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, hold unlawful and set aside or reverse such finding if the finding is clearly erroneous"). The Board determined that Mrs. Bonner was not entitled to DIC prior to November 1, 1994, regardless of whether Admiral Bonner's death was caused by Hodgkin's disease or NHL.

The Veterans Court did not decide or rely on the cause of Admiral Bonner's death in affirming the Board's decision. Rather, it relied on the characterization of Mrs. Bonner's 1975 claim, evidenced by the supporting documentation, as one for death caused by Hodgkin's disease. The Veterans Court merely concluded that this information provided a plausible basis for the RO's determination that Hodgkin's disease was the cause of death. Furthermore, even if we were to conclude that the Veterans Court exceeded its jurisdiction by deciding a factual issue not "necessary" to its decision, any such error would be harmless, as the grounds for the Veterans Court's decision would remain in place. Accordingly, we need not decide if the Veterans Court exceeded its jurisdiction in this instance.

III

The judgment of the Veterans Court is therefore

AFFIRMED.

NEWMAN, *Circuit Judge*, dissenting.

The Department of Veterans Affairs relied on a plainly incorrect autopsy diagnosis to deny Mrs. Bonner the Dependency and Indemnity Compensation benefits to which she is entitled. From the panel majority's denial of these benefits and refusal to correct the concededly incorrect cause of death, I respectfully dissent.

Admiral Emmett Peyton Bonner was a Naval officer who graduated from the United States Naval Academy in 1939. His naval career included service in World War II, Korea, and Vietnam. While in the service he was exposed to radiation during atmospheric nuclear testing in the South Pacific in 1958, and may have been exposed to Agent Orange in Vietnam. He retired at the age of 54 and died of cancer three years later.

Admiral Bonner's wife, the appellant, applied for Dependency and Indemnity Compensation, listing the cause of death as "cancer." An autopsy performed at the time of death by the National Naval Medical Center (NNMC) listed the cause of death as Hodgkin's Disease. Mrs. Bonner's claim was initially denied as not being service connected, since neither Hodgkin's Disease nor other forms of lymphoma (Non-Hodgkin's

Lymphoma or NHL) were presumptively service connected.

The National Institutes of Health subsequently reviewed the autopsy report and a group of slides that the government had preserved. The conclusion was that the original diagnosis of Hodgkin's Disease was incorrect, and that Admiral Bonner died of Non-Hodgkin's Lymphoma. It is not disputed that the second diagnosis is the correct one.

The panel majority, while asserting that the cause of death is a factual matter not open to our review, speculates about the meaning and accuracy of the two autopsy reports. Thus the court proposes that the 1975 diagnosis of Hodgkin's Disease as the cause of death may have been correct. The majority's preference for the 1975 diagnosis of Hodgkin's Disease is contrary to NIH's undisputed conclusion that the autopsy "favors" non-Hodgkin's lymphoma, and that the earlier diagnosis was incorrect. For example, the 1995 NIH report states that "although the infiltrate contains cells which resemble Reed-Sternberg cells and variants, the infiltrate lacks the usual inflammatory background of Hodgkin's disease. Immunohistochemical studies favor the diagnosis of non-Hodgkin's lymphoma." Reed-Sternberg cells, and the "usual inflammatory background" found to be absent, are mandatory elements of Hodgkin's disease. *See* Ramzi S. Cotran, et al. *Robbins Pathologic Basis of Disease* 5th ed. 2001, App. at 96-116. The NIH report concludes with the following paragraphs:

> The patient was a 57 year old white male diagnosed as lymphocyte-depleted Hodgkin's

disease in January 1975 and treated with combined chemotherapy and radiation, who died 8/1/75. At autopsy he was found to have extensive nodal and hepatic involvement by lymphoma, initially interpreted as consistent with Hodgkin's disease. The major pathological question addressed to us was whether, in light of current concepts, the tumor would be reclassified as a non-Hodgkin's lymphoma.

Microscopic examination of the lymph nodes and liver nodules show massive involvement by malignant lymphoid cells. The malignant cells are large, pleomorphic cells, with prominent nucleoli, some of which resemble Reed-Sternberg cells and variants. However, the background infiltrate is sparse and composed of small, mature lymphocytes. It lacks the normal mixed inflammatory background of Hodgkin's disease as well. The malignant cells are histologically identical in appearance to those seen in the biopsies of the abdominal mass (dated 2/6/75) and axillary lymph node (dated 4/3/75). Immunoperoxidase stains were performed on paraffin sections of the submitted surgical material and favor the diagnosis of non-Hodgkin's lymphoma. (See attached surgical pathology, report NIH #S95-5688)

T-cell rich B-cell lymphomas simulating Hodgkin's disease have been well described, and represent a 4-5% misdiagnosis of Hodgkin's disease. Indeed, a review of originally classified lymphocyte-depleted Hodgkin's disease cases at the National Cancer Institute revealed 26%

> with a high-grade non-Hodgkin's lymphoma, the majority of those cases were further classified as diffuse, large cell, immunoblastic type lymphomas.

The NIH report concluded that Admiral Bonner died of non-Hodgkin's lymphoma, and the Board of Veterans Appeals agreed. *See Appeal of Elizabeth Bonner*, No. 96-35144 (BVA Sept. 27, 2001) at 3 (setting forth the finding of fact that "the RO received evidence from the National Institutes of Health (NIH) indicating that the diagnosis of Hodgkin's disease made in the veteran's case in 1975 was in error and that the veteran had actually died of non-Hodgkin's lymphoma (NHL).") No contradiction to that finding is mentioned by the Board, or by the Veterans Court.

My concern is not that the Regional Office initially arrived at an incorrect cause of death based on an incorrect autopsy report. My concern is that the Board refused to change its ruling despite accepting the new and unchallenged information in the NIH autopsy report, leaving the plainly incorrect diagnosis unrepealed and thereby denying the widow her entitlement.

Nonetheless, the DVA has refused to correct the error in Admiral Bonner's records, thereby reducing the statutory benefits available to Mrs. Bonner. By statutory enactment after the Viet Nam war, Congress established the presumption that deaths from both Hodgkin's Disease and Non-Hodgkin's Lymphoma are service connected, but placed different retroactive effects on these determinations. Thus a veteran who died of NonHodgkin's Lymphoma entitles his widow to

compensation retroactive to 1964; that is, the claim benefits from the presumption of service connection, even if the claim had been denied before the statutory and regulatory provisions were enacted. However, compensation for Hodgkin's Disease is awarded only for the period after the law was enacted and only for a year before the claim is filed. (The difference appears to relate to Agent Orange exposure in Viet Nam). Thus, whether Admiral Bonner died of Hodgkin's Disease or Non-Hodgkin's Lymphoma determines whether Mrs. Bonner receives compensation from 1994 or from 1975.

Mrs. Bonner filed another request for compensation in 1995, requesting compensation from the filing of her original claim in 1975. The VA, applying the rules for Hodgkin's Disease based on the original autopsy, awarded compensation from 1994. The Regional Office refused to change the diagnosis despite the corrected autopsy report. The Board of Veterans Appeals remarked that the two autopsies reached different conclusions, but held that since the claim as originally filed was for Hodgkin's Disease, Mrs. Bonner could not receive the retroactive benefit of the Non-Hodgkin's statute and regulations. On appeal, the Court of Appeals for Veterans Claims ruled that the cause of death was Hodgkin's Disease since the Regional Office had made that determination and the BVA had not disturbed it.

The claim as initially filed by Mrs. Bonner named "cancer" as the cause of death. It is not disputed that both Hodgkin's Disease and Non-Hodgkin's Lymphoma are forms of cancer. However, the Veterans Court affirmed the BVA ruling that the initial claim for

"cancer" was really a claim based on Hodgkin's Disease because the evidence initially presented to the Regional Office stated that diagnosis. The Veterans Court refused to consider the second autopsy report.

Neither Mrs. Bonner nor the VA can be charged with prior knowledge that the original autopsy report was incorrect. The proper procedure is to correct the veteran's records in accordance with the correct autopsy report. It is not an unreviewable factual question of whether the VA is required to recognize an undisputed error in the veteran's records, and to apply the correct cause of death to survivors' claims. Upon such recognition, Mrs. Bonner's claim would be subject to determination on the correct grounds, whether or not she used the buzz-words "clear and unmistakable error (CUE)" in her petition (as the government argues). The obligatory veteran-friendly position of the law governing veterans' claims negates this hyper-technical reason whereby the Veterans Court refused to consider the merits of Mrs. Bonner's claim. From my colleagues' acceptance of this reasoning, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 02-742

[Decided June 17, 2005]

ELIZABETH H. BONNER,
APPELLANT,

v.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS,
APPELLEE.

On Appeal from the Board of Veterans' Appeals

Before IVERS, *Chief Judge*, and GREENE, and HAGEL, *Judges*.

GREENE, *Judge*, filed the opinion of the Court. HAGEL, *Judge*, filed a concurring opinion.

GREENE, *Judge*: Mrs. Elizabeth H. Bonner, widow of veteran Emmet P. Bonner, appeals, through counsel, a September 27, 2001, Board of Veterans' Appeals (Board) decision that denied an effective date earlier than November 1994 for an award of

dependency and indemnity compensation (DIC). Record (R.) at 1-35. Mrs. Bonner argues that under 38 U.S.C. § 5110(g), 38 C.F.R. § 3.313 (2004), and VA Office of General Counsel opinions she is entitled to an effective date of August 1975 for her DIC benefits. Appellant's Brief (Br.) at 4-10. She further maintains that the Board erred by ruling that her original service-connection claim in 1975 did not include a claim for non-Hodgkin's lymphoma. *Id.* The Secretary contends that the Board decision should be affirmed in that the Board had a plausible basis in the record for denying an effective date earlier than November 1, 1994. He also asserts that the Board's decision was supported by an adequate statement of reasons or bases. Secretary's Br. at 6-12. For the reasons that follow, the Board decision will be affirmed.

I. FACTS

Veteran Emmett P. Bonner served honorably in the U.S. Navy from June 1939 to April 1972, including service in World War II, the Korean Conflict, and Vietnam. R. at 38. In September 1972, he was awarded VA service connection for a hernia and hearing loss. R. at 189-90, 292. Mr. Bonner died on August 1, 1975. R. at 281. In September 1975, Mrs. Bonner filed an application for DIC and claimed that her husband died from cancer. R. at 276-79. Mr. Bonner's death certificate listed Hodgkin's disease as the cause of his death. R. at 281. An autopsy report from the National Naval Medical Center also noted that Mr. Bonner's death was caused by an "undifferentiated tumor, which was felt to be most consistent with Hodgkin's disease." R. at 288-89. A VA regional office (RO) denied her claim in February

1976 after finding that Mr. Bonner's Hodgkin's disease developed in January 1975, three years after his retirement from the Navy, and that in his service medical records there was no evidence of his having symptoms of that condition while in service. R. at 292. She did not appeal that decision. *See* R. at 1-744.

In October 1990, the Secretary promulgated VA regulation 38 C.F.R. § 3.313 (1991), which provided, as it does now, "[s]ervice in Vietnam during the Vietnam Era together with the development of non-Hodgkin's lymphoma manifested subsequent to such service is sufficient to establish service connection for that disease." 38 C.F.R. § 3.313(b). The effective date for this provision was August 5, 1964, the beginning date of the Vietnam era. *See McCay v. Brown*, 9 Vet.App. 183, 188 (1996); *see also* 55 Fed. Reg. 43,123 (Oct. 26, 1990). In February 1994, the VA General Counsel formally opined:

> An effective date for service connection of *non-Hodgkin's lymphoma* under 38 C.F.R. § 3.313 may generally be based on the date of receipt by the Department of Veterans Affairs of an original claim *for that benefit* filed on or after August 5, 1964, regardless of whether the claim had previously been denied, *if the claimant was otherwise eligible on the date of claim*.

VA Gen. Coun. Prec. 5-1994 (Feb. 18, 1994) [hereinafter G.C. Prec. 5-1994] (emphasis added). Also in February 1994, VA issued a regulation that stated, as it does now: "If a veteran was exposed to an herbicide agent during active military, naval, or air service, the following diseases shall be

service-connected . . . even though there is no record of such disease during service." 38 C.F.R. § 3.309(e) (1994). Hodgkin's disease and non-Hodgkin's lymphoma were listed as diseases presumed service connected under this regulation. *Id.* The effective date of that liberalizing regulation was February 3, 1994. 38 C.F.R. § 3.309(e); 59 Fed. Reg. 5106 (Feb. 3, 1994).

In November 1995, Mrs. Bonner informed the RO that a National Institutes of Health (NIH) oncologist had reviewed tissue samples and slides from Mr. Bonner's autopsy and had reviewed Mr. Bonner's service medical records. R. at 309. The oncologist diagnosed Mr. Bonner's tumor as "simulating Hodgkin's disease." R. at 302. The examiner also noted that "Immunohistochemical studies favor[ed] the diagnosis of non-Hodgkin's lymphoma." R. at 303. Mrs. Bonner asserted to the RO that, based upon this evidence, the earlier denial of her DIC claim was erroneous and that under 38 C.F.R. § 3.313, she was entitled to DIC effective in 1975, the year that she originally filed her DIC claim. *Id.* The RO considered the medical evidence and the February 1994 change in the law regarding presumptions of service connection for Hodgkin's disease and non-Hodgkin's lymphoma, and in a November 1995 decision stated:

> The veteran's death certificate showed the primary cause of death as Hodgkin's disease. No other conditions were shown as contributing to the cause of death. The letter from [Mrs. Bonner] indicated that the diagnosis of Hodgkin's disease by the National Naval Medical Center in Bethesda, [Maryland,] was in

> error. Mrs. Bonner indicated that a further study by the [NIH] indicated that in fact the disease was non-Hodgkin's lymphoma. The veteran served in the Republic of Vietnam during the Vietnam era, [and] is presumed to have been exposed to a herbicide containing dioxin (Agent Orange) while in Vietnam. Both Hodgkin's disease and non-Hodgkin's lymphoma may be caused by exposure to a herbicide containing dioxin. Therefore, service connection for cause of death is established.

R. at 312. The RO construed Mrs. Bonner's inquiries on this matter as an informal claim for review and found that the evidence showed Hodgkin's disease was the cause of Mr. Bonner's death. R. at 312-13. Mrs. Bonner was awarded DIC effective November 1995, the date of her informal claim for review. *Id.* Mrs. Bonner disagreed with the effective date, and, in a July 1996 Statement of the Case (SOC), the RO, under 38 C.F.R. § 3.114 (1995) (if a claim is reviewed at the request of the claimant more than one year after the effective date of the law or VA issue, benefits may be authorized for a period of one year prior to the date of receipt of such request), assigned an earlier effective date of November 1994. R. at 318-22. The RO ruled that Mrs. Bonner's reopened claim was filed more than a year after the liberalizing law authorizing a presumption of service connection for Hodgkin's disease based on herbicide exposure was promulgated, and that, therefore, under 38 C.F.R. § 3.114(a)(3) she was entitled to an effective date one year prior to the date of her request for review. *See* R. at 320-22.

Mrs. Bonner appealed to the Board and argued that she should have received an effective date of August 1, 1975. R. at 324-39. The Board found:

> [B]ecause the RO construed the appellant's November 1995 claim as a request to conduct a *de novo* or new review of her original claim for DIC based on the same facts, i.e., cause of death from Hodgkin's disease, under liberalizing provisions[,] which now provided a presumption of service connection for Hodgkin's disease and thereby created a new cause of action, the RO was able to grant an earlier effective date of November 1, 1994, under the exception to the general rule governing the assignment of effective dates for awards based on liberalizing laws. . . . Therefore, the RO construed the appellant's claim in the way most beneficial to her because it permitted her to receive payment of DIC for a year prior to receipt of the November 1995 claim.

R. at 32-33. The Board also concluded that an effective date earlier than November 1, 1994, would not have been assigned had the RO determined that non-Hodgkin's lymphoma had caused Mr. Bonner's death. R. at 30-31. The Board stated:

> [E]ven assuming, without deciding, that the appellant's reading of [G.C. Prec. 5-1994] as providing "benefits under [§] 3.313(b) retroactively effective to the date of the original claim, regardless of whether the claim had been previously denied," is correct, the Board concludes that the previous denial in such a

> case must have been a denial of a claim for service connection of [non-Hodgkin's lymphoma], not a denial of service connection for another disease. Thus, the Board need not reach the issue of whether an effective date for an award of DIC based on the date of the appellant's original claim would have been warranted in this case had the RO awarded DIC in 1995 based on cause of death from [non-Hodgkin's lymphoma] under 38 C.F.R. § 3.313 because the denial of appellant's original claim in 1976 was a denial based on cause of death from Hodgkin's disease, not [non-Hodgkin's lymphoma].
>
> Concerning this, the Board notes that, by submitting evidence in 1995 to show that, based on a study done by experts at NIH in June 1995, the cause of the veteran's death was actually [non-Hodgkin's lymphoma] and not Hodgkin's disease, the appellant was not requesting that the VA review her original claim under liberalizing laws enacted since the 1976 denial, but rather she was requesting that the VA reopen her original claim on a new factual basis – a factual basis other than the one on which the claim was considered in 1976. The latter is not a request for "review" of the same claim, i.e., the same *facts*, under a new law or new theory of legal entitlement but rather a request to reopen the original claim on a new factual basis as shown by new and material evidence submitted in 1995.

Id. This appeal followed.

II. CONTENTIONS ON APPEAL

Mrs. Bonner argues that, under 38 U.S.C. § 5110(g), 38 C.F.R. § 3.313, and VA General Counsel opinions interpreting these provisions, she is entitled to a September 1975 effective date for her DIC. Appellant's Br. at 4-10. She maintains that her original claim for "cancer" in September 1975 (R. at 276-79) encompassed, under 38 C.F.R. § 3.313(b), a claim for non-Hodgkin's lymphoma. *Id.* Alternatively she contends that her DIC award based on Hodgkin's disease as the cause of her husband's death entitles her to an earlier effective date under *Nehmer v. U.S. Dep't of Veterans Affairs*, 32 F. Supp. 2d 1175 (N.D. Cal. 1999) [hereinafter *Nehmer II*]. *Id.* at 10. Finally, at oral argument before the Court, Mrs. Bonner asserted that in the interest of fairness and equity she should be awarded an effective date of 1975.

The Secretary asserts that there was a plausible basis in the record for the Board's determination that November 1, 1994, was the proper effective date for Mrs. Bonner's DIC. Secretary's Br. at 4, 6-12. He further maintains that the Board decision was supported by an adequate statement of reasons or bases. *Id.*

III. ANALYSIS

Generally, "the effective date of an award based on an original claim, a claim reopened after final adjudication, or a claim for increase, of compensation, [DIC], or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." 38 U.S.C. § 5110(a);

see 38 C.F.R. § 3.400 (2004). The effective date of a reopened claim is either the date of application to reopen or is established in accordance with the facts found, whichever is later. *See Link v. West*, 12 Vet.App. 39, 46 (1998). Under 38 C.F.R. § 3.313(b), "[s]ervice in Vietnam during the Vietnam Era together with the development of non-Hodgkin's lymphoma manifested subsequent to such service is sufficient to establish service connection for that disease." The effective date for this provision is August 5, 1964, the beginning date of the Vietnam era. *See McCay*, 9 Vet.App. at 188; *see also* 55 Fed. Reg. 43,123 (Oct. 26, 1990). Additionally, VA regulation § 3.114(a) provides:

> (a) Effective date of award. Where pension, compensation, [or DIC], . . . is awarded or increased pursuant to a liberalizing law, or a liberalizing VA issue approved by the Secretary or by the Secretary's direction, the effective date of such award or increase shall be fixed in accordance with the facts found, but shall not be earlier than the effective date of the act or administrative issue. Where pension, compensation, [or DIC], . . . is awarded or increased pursuant to a liberalizing law or VA issue which became effective on or after the date of its enactment or issuance, in order for a claimant to be eligible for retroactive payment under the provisions of this paragraph the evidence must show that the claimant met all eligibility criteria for the liberalized benefit on the effective date of the liberalizing law or VA issue and that such eligibility existed continuously from that date to the date of claim or administrative determination of entitlement.

> (1) If a claim is reviewed on the initiative of VA within 1 year from the effective date of the law or VA issue, or at the request of a claimant received within 1 year from that date, benefits may be authorized from the effective date of the law or VA issue.
>
> (2) If a claim is reviewed on the initiative of VA more than 1 year after the effective date of the law or VA issue, benefits may be authorized for a period of 1 year prior to the date of administrative determination of entitlement.
>
> (3) If a claim is reviewed at the request of the claimant more than 1 year after the effective date of the law or VA issue, benefits may be authorized for a period of 1 year prior to the date of receipt of such request.

38 C.F.R. § 3.114(a)(1), (a)(2), (a)(3) (2004).

The Board's determination of an earlier effective date is reviewed under the "clearly erroneous" standard of review set forth in 38 U.S.C. § 7261(a)(4). *See Hanson v. Brown*, 9 Vet.App. 29, 32 (1996). "'A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Brown v. Brown*, 4 Vet.App. 307, 309 (1993); *see also Harder v. Brown*, 5 Vet.App. 183, 189 (1993); *Gilbert v. Derwinski*, 1 Vet.App. 49, 52 (1990) (emphasis added) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). Of course, if the Board's "'account of the evidence is plausible in light of the

record viewed in its entirety, the court of appeals may not reverse it.'" *Gilbert*, 1 Vet.App. at 52 (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985)). In general, the effective date for an award of benefits will be based on the date of the claim that resulted in that award. *See Williams v. Principi*, 15 Vet.App. 189, 195 (2001) (en banc), *aff'd*, 310 F.3d 1374 (Fed. Cir. 2002); *Lalonde v. West*, 12 Vet.App. 377, 380 (1999).

The Board must provide an adequate statement of the reasons or bases for its decision. *Gilbert*, 1 Vet.App. at 56-57. An adequate statement of reasons or bases must analyze the credibility and probative value of the evidence, account for the evidence that it finds persuasive or unpersuasive, and provide reasons for its rejection of any material evidence favorable to the veteran. *See* 38 U.S.C. § 7104(d)(1); *Gabrielson v. Brown*, 7 Vet.App. 36, 39-40 (1994); *Gilbert*, 1 Vet.App. at 56-57.

A. Effective Date for Hodgkin's Disease

The Board found that under § 3.114, the earliest possible effective date for Mrs. Bonner's claim was November 1, 1994. It is uncontested that Mrs. Bonner did not appeal the 1976 RO decision that denied DIC. *See* Appellant's Br.1-11; *see also* R. at 1-744. Therefore, that decision became final. *See* 38 U.S.C. § 7105(c); *see also Person v. Brown*, 5 Vet.App. 449, 450 (1993) (failure to file timely appeal of RO decision within one-year period renders decision final). Also, there is no dispute that Mrs. Bonner sent to the RO a letter in November 1995 (R. at 309) that the RO construed as an informal claim for review of her

previously denied DIC claim (R. at 312-13). The RO and the Board reviewed Mrs. Bonner's DIC claim and, under the liberalizing law in 38 C.F.R. § 3.309(e) (presumption of service connection for Hodgkin's disease), which was promulgated in February 1994, awarded her DIC. R. at 312-13. As stated above, 38 C.F.R. § 3.114(a)(3) provides that, "[i]f a claim is reviewed at the request of the claimant more than 1 year after the effective date of the law or VA issue, benefits may be authorized for a period of 1 year prior to the date of receipt of such request." *See McCay*, 9 Vet.App. at 188. Mrs. Bonner did not file her informal claim until more than one year after the liberalizing law that was enacted in February 1994, and, thus, the earliest possible effective date available to her for her DIC claim is November 1, 1994, the date awarded. Accordingly, viewing the record in its entirety, the Board had a plausible basis for its decision in this regard, and that decision thus is not clearly erroneous. Further, that decision is supported by an adequate statement of the reasons or bases. *See Hanson* and *Gilbert*, both *supra*.

Mrs. Bonner's argument that under *Nehmer II* she is entitled to an effective date before November 1, 1994, is unavailing. In May 1989, the United States District Court for the Northern District of California (District Court) "voided all benefit decisions made under [38 C.F.R. § 3.311a(d) (1986)]," *Nehmer v. United States Veterans' Admin.*, 712 F. Supp. 1404, 1409 (N.D. Cal. 1989) [hereinafter *Nehmer I*], and thereafter held in *Nehmer II* that *Nehmer I* had "voided those decisions in which the disease or cause of death is later found[,] under valid Agent Orange regulation(s)[,] to be service connected," *Nehmer II*, 32

F. Supp. 2d at 1183. The Agent Orange regulation at issue in the *Nehmer* proceedings, 38 C.F.R. § 3.311a, became effective on September 25, 1985. *See* 50 Fed. Reg. 34, 458 (Aug. 26, 1985). In *Williams v. Principi*, this Court held that a claimant was not entitled to an earlier effective date based upon her 1979 and 1985 claims because it was clear from *Nehmer I* and *Nehmer II* that the only claims voided were those that were denied between September 1985 and May 1989, the period when the invalidated regulation (38 C.F.R. § 3.311a(d)) was in effect. *Williams*, 15 Vet.App. at 195-97. In this case, Mrs. Bonner filed her original claim in 1975, 10 years before the promulgation of the regulation at issue in *Nehmer* was invalidated. Thus, *Nehmer I* and *Nehmer II* would not be applicable to Mrs. Bonner's claim, and she is therefore, not entitled to an effective date earlier than November 1, 1994, based upon the holdings in those cases. *See Williams*, *supra*.

B. Effective Date for non-Hodgkin's lymphoma

Mrs. Bonner further argues that, because she asserted that her husband died from "cancer" in her 1975 DIC claim, that claim necessarily included a claim for non-Hodgkin's lymphoma and that under 38 C.F.R. § 3.313 she is eligible for an earlier effective date. The United States Court of Appeals for the Federal Circuit and this Court have held that VA has a duty to develop fully and sympathetically a veteran's claim to its optimum and that VA is required to determine all potential claims raised by the evidence, applying all relevant laws and regulations. *Moody v. Principi*, 360 F.3d 1306 (Fed. Cir. 2004); *Szemraj v. Principi*, 357 F.3d 1370 (Fed. Cir. 2004); *Bingham v.*

Principi, 18 Vet.App. 470 (2004); *see also Roberson v. Principi*, 251 F.3d 1378 (Fed. Cir. 2001). Where such a review "reasonably reveals that the claimant is seeking a particular benefit, the Board is required to adjudicate the issue of the claimant's entitlement to such a benefit or, if appropriate, to remand the issue to the RO for development and adjudication of the issue." *Suttmann v. Brown*, 5 Vet.App. 127, 132 (1993). When discussing the evidence needed to identify and support a claim or application for benefits, the Court, in *Robinette v. Brown*, held:

> That "evidence" means more than just information to be filled in on the application form, and that an application includes the form *plus evidence in support of the claim* flows not only from the plain meaning of the term but also from the VA Adjudication Procedure Manual, M21-1.

Robinette, 8 Vet.App. 69, 78 (1995) (emphasis added).

Mrs. Bonner listed "cancer" on her original DIC application as the cause of Mr. Bonner's death (R. at 276-79), and submitted a copy of his death certificate that expressly listed his cause of death as "Hodgkin's disease" (R. at 281). Mrs. Bonner also provided to the RO an autopsy report that stated: "A biopsy of [the abdominal mass] revealed an undifferentiated tumor, which was felt to be most consistent with Hodgkin's disease." R. at 289. Mrs. Bonner does not argue that Hodgkin's disease and non-Hodgkin's lymphoma are the same condition, and her assertion that the generic label of "cancer" necessarily included non-Hodgkin's lymphoma as a potential cause of her husband's death

is not supported by the evidence of record. *See* R. at 281, 288-89, 292. At the time of the 1976 RO adjudication, the evidence established that Mrs. Bonner's claim was one for Hodgkin's disease as the cause of her husband's death, and, therefore, we cannot conclude that the evidence reasonably raised any claims for the cause of death by types of cancer other than Hodgkin's disease. *Compare Moody*, *Szemraj*, *Roberson*, and *Suttmann*, all *supra*. Because it was reasonable for the RO to rely on the then-competent medical evidence of record to identify the claim as one for Hodgkin's disease as the cause of death, the Board did not err by concluding that the denial of her claim in 1976 was based solely on the evidence that Hodgkin's disease caused Mr. Bonner's death. Thus, the 2001 Board correctly determined that Mrs. Bonner was not entitled to an effective date in 1975 under the interpretation of § 3.313 provided in G.C. Prec. 5-1994 because the previous denial of her claim must have been for a claim for service connection for non-Hodgkin's lymphoma, not for another disease.

Mrs. Bonner's evidence of non-Hodgkin's lymphoma as the cause of her husband's death was offered to the RO on November 1, 1995. Because the 1976 RO decision denying her claim was not appealed and had become final, the RO in 1995 treated that evidence as new and material evidence to reopen her claim. Thereafter, the RO again determined that the evidence of record revealed Hodgkin's disease as the cause of Mr. Bonner's death. R. at 312-13. The Board did not disturb the RO's finding as to the cause of Mr. Bonner's death (*See* R. at 1-35), and, consequently, the cause-of-death finding remained Hodgkin's disease. The Court reviews such findings under the "clearly

erroneous" standard of review. *See Brown, Harder,* and *Gilbert*, all *supra*. A review of the record in its entirety reveals that the Board had a plausible basis to find that the cause of Mr. Bonner's death was Hodgkin's disease. *Id*. Thus, that finding is not clearly erroneous. *Id*.

The Board also considered the possibility of non-Hodgkin's lymphoma as the actual cause of Mr. Bonner's death, but found that any such claim would be a claim to reopen Mrs. Bonner's original claim on a new factual basis as shown by new and material evidence submitted in 1995. R. at 16-18, 23-33. The Board concluded that even if she had prevailed on that claim, Mrs. Bonner still would not be entitled to an effective date earlier than November 1, 1994. *Id*. Under 38 U.S.C. § 5110(a), "the effective date of an award based on an original claim [or] a claim reopened after final disallowance . . . shall be fixed in accordance with the facts found, but *shall not be earlier than the date of receipt of application therefor*." *See also* 38 C.F.R. § 3.400 (emphasis added). Because Mrs. Bonner presented new and material evidence to VA concerning a potential change in diagnosis of the cause of her husband's death, that claim must necessarily be considered a reopening, based on new and material evidence, of her previously denied claim. Accordingly, the effective date of any award based upon non-Hodgkin's lymphoma cannot be earlier than the date of receipt of that application or claim, here, November 1, 1995, and the Board did not err in so holding. *Perry v. West*, 12 Vet. App. 365 (1999).

C. Equitable Relief

Mrs. Bonner's plea for equitable relief in this matter is not unnoticed. This Court, however, may not award equitable relief, no matter how compelling the facts. *See Moffitt v. Brown*, 10 Vet.App. 214, 225 (1997). On the other hand, the Secretary, in appropriate cases, has that authority. *See* 38 U.S.C. § 503(a); *Zimick v. West*, 11 Vet.App. 45, 50-51 (1998) (explaining that Secretary's authority to grant equitable relief under section 503 is wholly within Secretary's discretion and Court lacks jurisdiction to review exercise of Secretary's equity discretion); 38 C.F.R. § 2.7 (2004). Specifically, section 503 provides:

> If the Secretary determines that benefits administered by the Department have not been provided by reason of administrative error on the part of the Federal Government or any of its employees, the Secretary may provide such relief on account of such error as the Secretary determines equitable, including the payment of moneys to any person whom the Secretary determines is equitably entitled to such moneys.

38 U.S.C. § 503(a). Therefore, Mrs. Bonner may wish to petition the Secretary for relief under section 503(a), and the Secretary will certainly give it every consideration. *See Zimick*, *supra*.

IV. CONCLUSION

Upon consideration of the foregoing, the September 27, 2001, decision of the Board is AFFIRMED.

HAGEL, Judge, concurring: Although I concur in the result of this opinion, I respectfully disagree with the reasoning employed by the majority in part III.B regarding Mrs. Bonner's claim for service connection for non-Hodgkin's lymphoma under 38 C.F.R. § 3.313. In my view, the Court need not reach the issue of whether Mrs. Bonner's claim for "cancer" in her 1975 DIC application included a claim for non-Hodgkin's lymphoma because in order to prevail on her claim for an earlier effective date for DIC pursuant to § 3.313 the evidence must be at least in equipoise in support of her position that her husband died of non-Hodgkin's lymphoma, and the Court correctly determined, albeit without detailed explanation, that the VA finding that he died of Hodgkin's disease is not "clearly erroneous." *Ante* at 10; *see* 38 U.S.C. § 5107(b).

As set forth in the opinion above, the VA finding regarding the cause of death is a question of fact, which the Court cannot overturn absent a determination that it is clearly erroneous. *Ante* at 10; 38 U.S.C. § 7261(a)(4); *see Turner v. Brown,* 6 Vet.App. 256, 258 (1994). In 1976, VA concluded that Mr. Bonner's cause of death was Hodgkin's disease. R. at 292. The regional office readjudicated the claim in 1995 but did not alter its finding regarding the cause of death, and the Board did not disturb the regional office's finding. R. at 1-35, 312-313. Although the majority does not address the evidence of record presented by Mrs. Bonner that her husband died of non-Hodgkin's lymphoma, I believe that the record contains some evidence that Mr. Bonner died as a result of non-Hodgkin's lymphoma but that it also contains evidence that he died from Hodgkin's disease. The Naval Medical Center's 1975 autopsy report states

that Mr. Bonner had an "abdominal mass" that was most consistent with Hodgkin's disease lymphocyte depletion type. R. at 274. But that report also notes that "this is a rare type of Hodgkins" making up only 2% of all cases, and it is found in patients "frequently present with fever and night sweats, and rarely present with a mass." *Id.* In the June 19, 1995, National Institutes of Health report, an oncologist concludes that "[i]mmunohistochemical studies favor the diagnosis of non-Hodgkin's lymphoma" but also notes that Mr. Bonner's tumor contained cells which "simulat[ed] Hodgkin's disease." R. at 302-03. Both of these diagnoses are couched in terms of likelihood and probability. Because the National Institutes of Health report notes that Mr. Bonner's tumor simulated Hodgkin's disease and only "favors" the diagnosis of non-Hodgkin's lymphoma, it was not clearly erroneous for VA to find that this evidence is not in equipoise with the Naval Medical Center diagnosis of Hodgkin's disease. 38 U.S.C. § 5107(b).

Because the Board did not disturb the VA finding that Mr. Bonner died of Hodgkin's disease and because this Court has not overturned that determination, Mrs. Bonner's argument for an earlier effective date for DIC under 38 C.F.R. § 3.313 is unavailing. Given that the evidence of record does not establish that Mr. Bonner died from non-Hodgkin's lymphoma, the issue of the breadth of Mrs. Bonner's initial claim for benefits is not, in my view, properly before us at this time. Consequently, I believe that it was unnecessary for the majority in part III.B to reach the question of whether a previously denied application for service connection for "cancer" may include a claim for non-

Hodgkin's lymphoma pursuant to G.C. Prec. 5-1994 and § 3.313. *Ante* at 8-10.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2005-7190

[Filed November 29, 2007]

ELIZABETH H. BONNER,
Claimant-Appellant,

v.

GORDON H. MANSFIELD,
Acting Secretary of Veterans Affairs,
Respondent-Appellee.

OPINION

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Appellee, and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on December 6, 2007.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2005-7190

[Excerpts From Claimant-Appellant's Petition For Panel Rehearing and Rehearing En Banc]

[Filed September 28, 2007]

ELIZABETH H. BONNER,	)
Claimant-Appellant,	)
	)
v.	)
	)
GORDON H. MANSFIELD,	)
Acting Secretary of Veterans Affairs,	)
Respondent-Appellee.	)
	)

* * *

3. The Panel overlooks *Perrin V. United States*, 444 U.S. 37, 42 (1979), *Leocal v. Ashcroft*, 543 U.S. 1, 15 (2004), *Brown v. Gardner*, 513 U.S. 115, 118 (1994), and *AK Steel Corp. v. United States*, 226 F.3d 1361, 1371 (Fed. Cir. 2000) and *Kirkendal v. Dept. of the Army*, 479 F.3d 830, 843-844 (Fed. Cir. 2007)(en banc) concerning the Veterans Court's purported reliance on *Moody V. Principi*, 360 F.3d 1306, 1310 (Fed. Cir.

2004) to fashion a rule of law inconsistent with these precedents and overlooks the fact that appellant has requested reversal on this basis. That the Veterans Court violated *Moody* itself (and other law) in reading a formal, explicit claim in a manner that was not even literal is a separate argument.

The panel misconstrues our argument concerning the Veterans Court's reliance on *Moody v. Principi*, 360 F.3d 1306, 1310 (Fed. Cir. 2004). The court writes:

> "First, Mrs Bonner asserts the Veterans Court misconstrued our decision in *Moody v. Principi* ('Moody') when it did not read her 1975 claim for 'cancer' as encompassing a claim for NHL."
>
> (Panel Op. at 6).

> "In essence, she disagrees with the Veteran's Court's conclusion that a claim for NHL was not supported by the evidence before the RO in 1976."
>
> (Panel Op. at 8).

It is more than clear that this court cannot review fact finding as such below, even with a "mountain" of contradictory evidence (*Andino v. Nicholson*, ___F.3d___ (No. 2006-7313, Federal Circuit, decided September 10, 2007, 2007 U.S.App. Lexis 21639, slip op. at 4-5)), although this Court will occasionally alert interested parties and tribunals to the existence and nature of manifest factual error *(Ibid.)*. The Veterans Court has gone so far as to remand factual error to the Board with instructions to find a particular fact in the veteran's favor: *Brown v. Brown*, 4 Vet. App. 307, 309 (1993).

Our appeal is that the Veterans Court cited Moody *as precedent* for a set of unlawful procedures and decisional processes which it employed for which Moody provided no authority and which were otherwise unprecedented and unlawful.

We raised this issue in our Opening Brief:

> "The Veteran's Court below announced a new legal rule to be applied to all claims made by veterans for benefits. The new rule is that the VA can look to the surrounding materials in its file not only to deny an express claim, but also to re-write what the claim supposedly was in the first instance; all without notice to the veteran. The Veterans' court professes to have found this law in decisions of this Court." (App. Op. Br. 24-25). (*See also* App. Op. Br. pp 2, 5-6; App. Reply Br. p. 12)

As we affirmed during oral argument in response to a direct question by Judge Gajarsa, we are not (except in our Constitutional argument) asking this court to review findings of fact. We are asking the court to send this case back to the Board to do so. With respect to the Veterans Court, we asked this court to review the law and procedure used by the Veterans Court in that court's review and finding of facts. The Veterans Court applied an incorrect legal standard and an incorrect legal procedure. Its incorrect legal standard was one which allowed the VA a free interpretation of words, and not the restricted standard of the Supreme Court and this Court concerning the interpretation of words cited *supra*. The Veterans Court did not explain how the plain meaning of the word "cancer" could be so

disregarded, in the teeth of Supreme Court precedent and precedent of this Court to the contrary nor how this could be done lawfully and reasonably without the knowledge or consent of the claimant. Not only must the plain meaning of words be used, the process of parsing itself is governed by particular law.

> "Even if this were a close case, which it is not, the canon that veterans' benefits statutes should be construed in the veteran's favor would compel us [to act consistently with the canon]. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n9 (1991) ('Even if the express examples [from other subsections of the statute at issue] unsettled the significance of subsection (d)'s drafting, however, we would ultimately read the provision in King's favor under the canon that provisions for benefits to members of the Armed Forces are to be construed in the beneficiaries' favor..') *Ala. Power Co. v. Davis,* 431 U.S. 581, 584 (1977) ('This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.') (quoting *Fishgold v. Sullivan Drydock & Repair Corp.*, 328U.S. 275, 285 (1946))."

Kirkendall v. Department of the Army, 479 F. 3d 830, 843-844 (Fed. Cir. 2007)(en banc).

Failure to apply the correct law is an error reviewable by this Court. *Wilson v. Principi*, 391 F.3d 1203, 1211 (Fed. Cir. 2004):

> "Thus the decision of the Court of Appeals for Veterans Claims in this case, in which the court failed to consider the impact of a law in effect at the time of its decision, is a 'decision of the Court on a rule of law' within the meaning of 38 U.S.C. section 7292."

The incorrect legal procedure was the Veterans Court's using surrounding "evidence" (the government's death certificate and the government's misdiagnosis) to adversely define and limit the claimant's claim, all without notice or an opportunity for the claimant to be heard. This rule of law employed by the Veterans Court (that a claim can be given a restrictive meaning at all, and further that this be done without the claimant being notified it was being done) was inconsistent with the Supreme Court precedents and precedents of this Court, *supra*, and constituted error.

Further, in the event the appellant must rely on CUE, despite her arguments that this is a new claim, the Veterans Court and the Panel erred in holding that her appeal time had run, where the appellant was affirmatively misled and never advised that the government had restricted her claim until well after the time to appeal had expired. *See Ingram v. Nicholson*, 21 Vet. App. 232, 240-241 (May 23, 2007) ("the time for appealing either an RO or Board decision did not run where the [Secretary] failed to provide the veteran with information or material critical to the appellate process. *Cook [v. Principi,]* 318 F.3d [1334] at 1340 [Fed. Cir. 2002, en banc].").

It would not be within the realm of decent argument to maintain that "death not due to service" constituted proper notice to the widow that her claim for cancer had been denied by the VA only as to Hodgkin's disease.

* * *

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2005-7190

[Excerpts From Claimant-Appellant's Federal Circuit Reply Brief]

[Filed February 6, 2006]

ELIZABETH H. BONNER, Claimant-Appellant,	)
v.	)
R. JAMES NICHOLSON, Secretary of Veterans Affairs, Respondent-Appellee.	)

* * *

A. Cancer means cancer. It includes non-Hodgkin's lymphoma.

At issue in this case is whether, when the widow claimed "cancer" as cause of death, her claim encompassed a claim for non-Hodgkin's lymphoma, as used in VAOPGCPREC 5-94 which ruled that a claim "for that benefit" was sufficient for payment of

compensation even if the claim had previously been denied. The widow pointed out in her opening brief that the Supreme Court has ruled that words are construed to have their "ordinary and natural meaning", *Leocal v. Ashcroft,* 543 U.S. 1, 15 (2004). This court has also so held. *AK Steel Corp. v. United States*, 226 F.3d 1361, 1371 (Fed. Cir. 2000). Ambiguity in a statute is resolved in favor of the veteran. *Brown v. Gardner,* 513 U.S. 115, 118 (1994). Since non-Hodgkin's lymphoma is cancer, the claim encompasses it.

The government's response. The government does not mention these cases nor the above argument in its brief, and leaves them unanswered. It does present an argument that given the opportunity to "interpret" the word, it could come up with reasons it might be argued to mean only the misdiagnosed form of cancer (Hodgkin's lymphoma), but in doing so has to resort to ignoring the plain meaning of the word, attempting to force on the widow's claim the mistakes of the government not adopted by her and which the VA assembled months after the claim was made, by ignoring the *ex parte* unilateral nature of the VA's actions, by inventing a rule of law that a claim can only be coextensive with its reason for denial, and by resolving any ambiguity created by their process in favor of the VA. By saying that the claim was too broad and needed development, the government is saying that it was ambiguous. Ambiguities are required by law to be resolved in favor of the veteran. *Moody, supra,* 360 F. 3d at 1310.

The government addresses whether the VA in 1976 erred in denying the claim, and mounts an argument that the VA was justified in 1976 in denying the claim. All this, even if it were true, is beside the point of this appeal, which is not an appeal of the wrongly-decided 1976 RO decision. It is irrelevant whether the RO erred in 1976 or not. This appeal is of the Veterans Court's 2005 decision involving the application of 38 U.S.C. 5110(g), 38 CFR 3.313, and VAOPGCPREC 5-94 regarding a change of law in 1990 effective 1964.

* * *

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2005-7190

[Excerpts From Claimant-Appellant's Federal Circuit Opening Brief]

[Filed November 4, 2005]

ELIZABETH H. BONNER, Claimant-Appellant,	)
v.	)
R. JAMES NICHOLSON, Secretary of Veterans Affairs, Respondent-Appellee.	)

* * *

A. "cancer" means "cancer". It includes non-Hodgkin's lymphoma.

The widow's pro se claim is to be sympathetically viewed. Even if subjected to the review given to statutory terms, however, the claim for "cancer" would suffice to encompass its various forms. When a statute does not define a term, the agency and

reviewing court must give the undefined term its ordinary meaning. *AK Steel Corp. v. United States*, 226 F. 3d 1361, 1371 (Fed. Cir. 2000) (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that , unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). See also *Humana, Inc. v. Forsyth*, 525 U.S. 299, 309-10 (1999) (using Black's law dictionary when interpreting a statutory term).

When interpreting a statute, we must give words their "ordinary or natural meaning". *Leocal v. Ashcroft*, 543 U.S. 1, 15 (2004) (unanimous decision).

Ambiguity in a statute is resolved in favor of the veteran, *Brown v. Gardner,* 513 U.S. 115, 118 (1994).

Moreover, the surrounding "evidence" that the Veterans' Court looks to differs from the legislative history of a statute in numerous respects, one of which is that the widow had nothing to do with generating the erroneous VA documents that the Veterans' Court resorts to in "interpreting" her claim, whereas legislative acts are the product of those creating the legislative history.

* * *

APPENDIX G

VETERANS ADMINISTRATION APPLICATION FOR DEPENDENCY AND INDEMNITY COMPENSATION OR DEATH PENSION BY WIDOW OR CHILD

[Signed August 30, 1975]

[See foldout Exhibit]

Form approved.
Budget Bureau No. 76-R0030

VETERANS ADMINISTRATION

APPLICATION FOR DEPENDENCY AND INDEMNITY COMPENSATION OR DEATH PENSION BY WIDOW OR CHILD

(INCLUDING ACCRUED BENEFITS AND DEATH COMPENSATION, WHERE APPLICABLE)

IMPORTANT—Read instructions before filling in form. Answer all items fully. Detach and retain ONLY the instruction sheet. If more space is required attach additional sheets and identify each answer by item number

(DO NOT WRITE IN THESE SPACES)

VA DATE STAMP

1. LAST NAME - FIRST NAME - MIDDLE NAME OF DECEASED VETERAN (Type or print)

BONNER, Emmett Peyton

2A. FIRST NAME - MIDDLE NAME - LAST NAME OF CLAIMANT (Type or print)

Elizabeth H. Bonner

2B. TELEPHONE NO.

301/652-3010

2C. MAILING ADDRESS OF CLAIMANT (Number and street or rural route, City or P.O., State and ZIP Code)

[redacted]

2D. RELATIONSHIP TO VETERAN (Check one)

☒ WIDOW ☐ CHILD

3. IF VETERAN PREVIOUSLY APPLIED TO THE VETERANS ADMINISTRATION FOR ANY BENEFIT, INSERT CLAIM NUMBER, IF KNOWN

C- unk

4. SOCIAL SECURITY NUMBER OF VETERAN

[redacted]

5. RAILROAD RETIREMENT NO.

n/a

6. VETERANS ADMINISTRATION CLAIM NO.

XC-

PART I - IDENTIFICATION AND SERVICE INFORMATION OF VETERAN (See Instructions - paragraphs F & G)

7. DATE OF BIRTH

[redacted]18

8. PLACE OF BIRTH

Macon, Georgia

9. DATE OF DEATH

8/1/75

10. PLACE OF DEATH

Bethesda, Maryland

11A. CAUSE OF DEATH (See instructions, paragraph F)

CANCER

11B. ARE YOU CLAIMING THAT THE CAUSE OF DEATH WAS DUE TO SERVICE?

☒ YES ☐ NO

12A. ENTERED ACTIVE SERVICE		12B. SERVICE NO.	12C. SEPARATED FROM ACTIVE SERVICE		12D. GRADE, RANK OR RATING, ORGANIZATION AND BRANCH OF SERVICE
DATE	PLACE		DATE	PLACE	
6/1/39	Naval Academy	82744	5/1/72	Wash. D.C.	RADM, USN, Ret.

12E. IF VETERAN SERVED UNDER A NAME OTHER THAN THAT SHOWN IN ITEM 1, GIVE FULL NAME AND SERVICE RENDERED UNDER THAT NAME

n/a

PART II - INFORMATION RELATING TO MARRIAGE (See Instructions, paragraph H)

INFORMATION RELATING TO VETERAN

14. HOW MANY TIMES WAS VETERAN MARRIED?

once

15A. MARRIAGE		15B. TO WHOM MARRIED	15C. HOW MARRIAGE ENDED (Death, divorce, etc.)	15D. MARRIAGE ENDED	
DATE	PLACE			DATE	PLACE
2 Sept. '42	St. Patricks Cathedral New York City	Elizabeth HEALY	death	8/1/75	Maryland

INFORMATION RELATING TO WIDOW OR MOTHER OF THE CHILDREN FOR WHOM THIS CLAIM IS BEING MADE

16. HOW MANY TIMES HAS WIDOW BEEN MARRIED?

once

17. HAS WIDOW REMARRIED SINCE DEATH OF VETERAN? ☐ YES ☒ NO (If "Yes," complete Item 18 and 19)

18. DATE REMARRIED

n/a

19. PLACE REMARRIED

n/a

20A. MARRIAGE		20B. TO WHOM MARRIED	20C. HOW MARRIAGE ENDED (Death, divorce, etc.)	20D. MARRIAGE ENDED	
DATE	PLACE			DATE	PLACE
2 Sept. '42	St. Patricks Cathedral New York City	Emmett Peyton Bonner	death	8/1/75	Maryland

VA FORM 21-534 JAN 1974

SUPERSEDES VA FORM 21-534c NOV 1972 WHICH WILL NOT BE USED.

BEST AVAILABLE COPY

PART II - INFORMATION RELATING TO MARRIA (ontinued)

NOTE: If claimant is not the on's widow, omit items 21 to 26, inclusive

24. MAIDEN NAME OF VETERAN'S WIDOW (First - middle - last)		25. DATE OF BIRTH
24. PLACE OF BIRTH	27. WAS A CHILD BORN OF WIDOW'S MARRIAGE TO VETERAN? ☐ YES ☐ NO	28. DID WIDOW LIVE CONTINUOUSLY WITH THE VETERAN FROM DATE OF MARRIAGE TO DATE OF DEATH? ☐ YES ☐ NO (If "No," fill in 29)

29. CAUSE OF SEPARATION (Explain fully. Divide, year or, date of separation, duration, etc. If separation was by court order, attach a certified copy of such order.)

PART III - INFORMATION CONCERNING CHILDREN (See instructions, paragraph 7)

IDENTIFICATION OF CHILDREN AND INFORMATION RELATIVE TO CUSTODY

NOTE - List below, the name of each unmarried child of the veteran, including adopted child or stepchild, under 18 years of age (or under 23 years of age if attending school), or of any age if permanently incapable of self-support by reason of mental or physical defect. If the birth of a child of the veteran is expected, that fact should be stated.

27A. NAME OF CHILD	27B. DATE OF BIRTH	27C. PLACE OF BIRTH	27D. NAME AND ADDRESS OF PERSON HAVING CUSTODY OF EACH CHILD

NOTE - Item 28 to be answered by widow only if any child listed above is not in her custody

28. DO YOU ALSO DESIRE THIS APPLICATION TO BE CONSIDERED AS A CLAIM FOR THE VETERAN'S CHILDREN LISTED IN ITEM 27A WHO ARE NOT IN YOUR CUSTODY? ☐ YES ☐ NO

ADDITIONAL INFORMATION RELATING TO CHILDREN LISTED IN ITEM 27A

29. NAME OF LEGALLY ADOPTED CHILD (If none, write "NONE")	30. NAME OF HELPLESS CHILD (If none, write "NONE")	31. HAS SUCH CHILD EVER MARRIED? ☐ YES ☐ NO

32. NAMES OF CHILDREN OF AGE 16 THRU 22 WHO ATTEND SCHOOL REGULARLY (If none, write "NONE")

33. NAME OF ILLEGITIMATE CHILD (If none, write "NONE")	34. NAME OF STEPCHILD (If none, write "NONE")

NOTE: If no children are listed in items 33 and 34, do not fill in item 35

35. NAMES OF CHILDREN LISTED IN ITEMS 33 AND 34 WHO WERE MEMBERS OF THE VETERAN'S HOUSEHOLD AT TIME OF VETERAN'S DEATH (If none, write "NONE")

NOTE: If the veteran died while in active service or if he had no service after April 5, 1917, do not fill in Parts IV, V, or VI

PART IV - ANNUAL INCOME OF WIDOW AND/OR CHILD (By calendar years)

IMPORTANT - Read carefully instructions, paragraph 7 before answering questions. All items required to be filled in must be answered FULLY.

COMMERCIAL LIFE INSURANCE PAYMENTS TO CLAIMANT

NOTE. Include Federal Employees' Government Life Insurance BUT do not include insurance payable by Veterans Administration.

36A. TOTAL AMOUNT RECEIVED OR EXPECTED	$
36B. AMOUNT RECEIVED OR EXPECTED DURING THE YEAR IN WHICH VETERAN DIED	$
36C. AMOUNT RECEIVED OR EXPECTED DURING THE FOLLOWING YEAR	$

PART IV - ANNUAL INCOME OF WIDOW AND/OR CHILD *(By calendar years. (Continued)*

OTHER INCOME

LINE NO	1A SOURCE	AMOUNT OF INCOME (B) WIDOW	(C) NAME OF CHILD	(D) NAME OF CHILD	(E) NAME OF CHILD
	NOTE: INCOME RECEIVED FROM JANUARY 1 TO DATE OF DEATH OF VETERAN or, if claim is filed more than a year after the veteran died, income received from January 1 to date you sign this application.				
37A	EARNINGS FROM ALL EMPLOYMENT	$			
37B	SOCIAL SECURITY	$	$	$	$
37C	OTHER ANNUITIES OR RETIREMENTS				
37D	DIVIDENDS, INTEREST, ETC				
37E	ALL OTHER INCOME				
37F	TOTAL INCOME	$	$	$	$
	Do NOT complete lines 37G and 37H if you had no income from those sources				
37G	GROSS INCOME FROM SELF-EMPLOYMENT FARM OR BUSINESS *(Include net income in line 37E)*	$	$	$	$
37H	GROSS INCOME FROM RENTALS FROM REAL ESTATE *(Include net income in line 37E)*	$	$	$	$
	NOTE: INCOME EXPECTED FROM DATE OF DEATH OF VETERAN TO DECEMBER 31 THAT YEAR or, if claim is filed more than a year after the veteran died, income expected from the date you sign this application to December 31 of the same year				
38A	EARNINGS FROM ALL EMPLOYMENT	$			
38B	SOCIAL SECURITY		$	$	$
38C	OTHER ANNUITIES OR RETIREMENTS				
38D	DIVIDENDS, INTEREST, ETC				
38E	ALL OTHER INCOME				
38F	TOTAL INCOME	$	$	$	$
	Do NOT complete lines 38G and 38H if you had no income from those sources				
38G	GROSS INCOME FROM SELF-EMPLOYMENT, FARM OR BUSINESS *(Include net income in line 38E)*	$	$	$	$
38H	GROSS INCOME FROM RENTALS FROM REAL ESTATE *(Include net income in line 38E)*	$	$	$	$
	NOTE INCOME EXPECTED FOR THE NEXT CALENDAR YEAR If you are unable to state the exact amount, give approximate amounts expected				
39A	EARNINGS FROM ALL EMPLOYMENT	$			
39B	SOCIAL SECURITY		$	$	$
39C	OTHER ANNUITIES OR RETIREMENTS				
39D	DIVIDENDS, INTEREST, ETC.				
39E	ALL OTHER INCOME				
39F	TOTAL INCOME	$	$	$	$
	Do NOT complete lines 39G and 39H if you had no income from those sources.				
39G	GROSS INCOME FROM SELF-EMPLOYMENT, FARM OR BUSINESS *(Include net income in line 39E)*	$	$	$	$
39H	GROSS INCOME FROM RENTALS FROM REAL ESTATE *(Include net income in lines 39E)*	$	$	$	$

40A HAVE YOU APPLIED FOR OR ARE YOU RECEIVING OR ENTITLED TO RECEIVE ANY BENEFITS FROM THE SOCIAL SECURITY ADMINISTRATION?

☐ YES ☐ NO *(If "Yes," fill-in items 40B thru 40D)*

40B. BEGINNING DATE *(Month and year)*

40C. MONTHLY AMOUNT

$

40D. IS YOUR SOCIAL SECURITY BASED ON YOUR OWN EMPLOYMENT?

☐ YES ☐ NO *(If "Yes," fill-in item 40E)*

40E. SOCIAL SECURITY NO.

[redacted]

If part of your income is from any other retirement plan, annuity, or endowment insurance based upon your employment, fill-in 41A to 42

41A BEGINNING DATE *(Month and year)*	41B. MONTHLY AMOUNT	42 BY WHOM PAID *(Name and address)*

PART V - DEDUCTIBLE EXPENSES

NOTE - Your income may be reduced by the amount of unreimbursed expenses of the veteran's or his child's last illness and burial and the veteran's just debts which were paid by you after his death. Be sure to include as income in items 37E, 38E and 39L any reimbursement received on these expenses or debts. See Par. "L" of instructions for reporting payments and reimbursements made after filing of your claim.

43A. NAME AND ADDRESS OF PERSON TO WHOM PAID	43B. TOTAL AMT. OF EXPENSE OR DEBT	43C. NATURE OF EXPENSE OR DEBT	43D. DATE PAID	43E. AMOUNT PAID BY YOU
	$			$
	$			$
	$			$

PART VI - NET WORTH OF WIDOW AND/OR CHILD OR CHILDREN (See Instructions, para. M, items 44A to 44E incl.)

LINE NO.	SOURCE	AMOUNTS			
		WIDOW	NAME OF CHILD	NAME OF CHILD	NAME OF CHILD
44A	STOCKS, BONDS, BANK DEPOSITS	$	$	$	$
44B	REAL ESTATE				
44C	OTHER PROPERTY				
44D	TOTAL DEBTS				
44E	NET WORTH	$	$	$	$

PART VII - MISCELLANEOUS INFORMATION

45. X FULL NAME OF VETERAN'S MOTHER: Bessie Napier Bonner

46. X FULL NAME OF VETERAN'S FATHER: Emmett Peyton Bonner

46A. ADDRESS OF VETERAN'S MOTHER, IF LIVING: N/A

46B. ADDRESS OF VETERAN'S FATHER, IF LIVING: N/A

47. X HAS WIDOW OR CHILD FILED CLAIM FOR COMPENSATION FROM UNITED STATES BUREAU OF EMPLOYEES COMPENSATION BECAUSE OF DEATH OF VETERAN ON WHOSE SERVICE THIS CLAIM IS FILED? ☐ YES ☒ NO

48. X HAS THE WIDOW OR CHILD PREVIOUSLY FILED CLAIM FOR BENEFITS WITH THE VETERANS ADMINISTRATION? ☐ YES ☒ NO (If "Yes," fill in 48B thru 50 inclusive)

48B. NAME OF PERSON ON WHOSE SERVICE CLAIM WAS MADE: n/a

48C. RELATIONSHIP TO CLAIMANT: n/a

49. CLAIM NO.: C-

50. OFFICE WHERE CLAIM WAS FILED (City and State)

51. X HAS ANY FEE BEEN PAID OR WILL ANY FEE BE PAID TO ANY PERSON FOR ASSISTANCE IN THE PREPARATION OF THIS APPLICATION FORM? ☐ YES ☒ NO (If "Yes," fill in 52 and 53.)

52. NAME AND ADDRESS OF PERSON ASSISTING: Mark Healy Bonner, Esq.

53. AMOUNT OF FEE: $ gratis

54. REMARKS (Use this space for any additional information regarding this claim.)

CERTIFICATION: I CERTIFY THAT the foregoing statements are true and correct to the best of my knowledge and belief.

55. X DATE SIGNED: 30 August 1975

56. X SIGNATURE OF CLAIMANT: Elizabeth Healy Bonner

WITNESS TO SIGNATURE OF CLAIMANT IF MADE BY "X" MARK. Note - Signature made by mark must be witnessed by two persons to whom the person making the statement is personally known and the signatures and addresses of such witnesses must be shown below.

56A. SIGNATURE OF WITNESS

56B. SIGNATURE OF WITNESS

56D. ADDRESS OF WITNESS

56E. ADDRESS OF WITNESS

PENALTY - The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false, or for the fraudulent acceptance of any payment to which you are not entitled.